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A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

***James H. Quello, Chairman**

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*Commissioner Quello designated as Chairman effective February 5, 1993.
**Commissioner Marshall resigned effective April 30, 1993.

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SOKOL AMERICA, INC. File No. I-T-C-92-035

Application for authority pursuant to Section 214 of the Communications Act of 1934, as amended, to establish channels of communication between the United States and the Russian Federation for the provision of public switched services.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: June 30, 1993; Released: July 26, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience require its grant.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-92-035 IS GRANTED and Sokol America, Inc. is authorized to:

a. establish and operate up to 100 64-kbps equivalent channels of communications between appropriately licensed earth stations in the U.S. and the Geizer satellite system located at 13.5^{0} W.L.; and

b. use said facilities for the provision of public switched network services, including switched voice service, between the U.S. and the Russian Federation.[1]

3. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

4. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic, required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

5. IT IS FURTHER ORDERED that the applicant shall file a separate Section 214 application for the use of any additional circuits over this separate satellite systems.

6. IT IS FURTHER ORDERED that no material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between the applicant and its foreign correspondent in the Russian Federation. A copy of each of the agreements shall be filed with the Commission within 30 days of its execution and shall otherwise comply with the filing requirements contained in §43.51 of the Commission's Rules, 47 C.F.R. §43.51.

7. IT IS FURTHER ORDERED that neither the applicant nor any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the U.S., its territories or possessions, which is denied to any other U.S. carrier by reason of any concession, contract, understanding, or working arrangement to which the applicant or any persons or companies controlling it or controlled by it is a party.

8. IT IS FURTHER ORDERED that the Commission reserves the right to revoke and/or reassign the above-authorized circuits should the applicant be unable to utilize the authorized number of circuits within ninety (90) days of the release of this order.

9. IT IS FURTHER ORDERED that the continued effectiveness of this authorization is conditioned on the outcome of future review by the Executive Branch and the Commission. If it is determined that the continued use of the Geizer satellite system is no longer in the national interest, this authorization will be subject to cancellation.

10. IT IS FURTHER ORDERED that the applicant shall submit quarterly reports detailing the number of PSN circuits in use each month over the Geizer satellite system. The report should also detail monthly the "no circuit" conditions during the reporting period. The reports shall also set forth the number of circuits the applicant has in use over each communications system for the countries served by the Geizer satellite system. The quarterly reports shall be submitted within 60 days from the end of each calendar quarter.[2]

11. This order is issued pursuant to 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the public notice date of this order (*See* Section 1.4 (b)(2)).

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[1] In a letter dated March 16, 1992, the Department of State informed the Commission that U.S. obligations under Article XIV(d) of the INTELSAT Agreement have been satisfied with regard to the use of the Geizer satellite system for the provision of communications interconnected with the public switched networks, totaling no more than 100 64-kbps equivalent circuits, between the U.S. and the Russian Federation and European countries not members of INTELSAT. *See* letter dated March 16, 1992 from Steven W. Lett, Director for Satellite and Cable Policy, Bureau of International Communications and Information Policy, Department of State to George S. Li, Chief, International Facilities Division, Common Carrier Bureau, Federal Communications Commission.

[2] This reporting requirement is subject to approval by the Office of Management and Budget.

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ALASCOM, INC. File No. I-T-C-92-229

For authority pursuant to
Section 214 of the Communications
Act of 1934, as amended, to
establish and operate channels
of communication, via the
AURORA II satellite system
for the provision of international
private line service and for the
provision of voice service
interconnected with the public
switched network between Kapron,
Magadan, Russia and Eagle River,
Alaska.

ORDER AND AUTHORIZATION

Adopted: June 30, 1993; Released: July 26, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require its grant.

2. Accordingly, IT IS ORDERED, that application File No. I-T-C-92-229 IS GRANTED and Alascom, Inc. is authorized to:

(a) establish and operate 2 T-1 (48 64-kbps) half-circuits via the Alascom's AURORA II satellite for the provision of private line voice and data service not interconnected to the public switched network (PSN) between Kapron, Magadan, Russia and Eagle River, Alaska; and

(b) establish and operate up to 100 64-kbps equivalent half-circuits via the AURORA II satellite for the provision of voice service interconnected to the PSN between Kapron, Magadan, Russia and Eagle River, Alaska.[1]

3. IT IS FURTHER ORDERED that our authorization of Alascom to provide private lines is limited to the provision of such private lines only between the United States and Russia -- that is, private lines which originate in the United States and terminate in Russia or which originate in Russia and terminate in the United States. In addition, Alascom may not -- and Alascom's tariff must state that Alascom's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. end or Russia end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that Russia affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending.*

4. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreement it enters into with its foreign correspondents with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

5. IT IS FURTHER ORDERED that neither Alascom nor any persons or companies directly or indirectly controlling or controlled by Alascom, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which Alascom or any persons or companies controlling or controlled by Alascom are parties.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file an application pursuant to Section 214 of the Communications Act, 47 U.S.C. §214, before adding any circuits or channel of communications for the provision of service over the AURORA-II satellite system.

9. IT IS FURTHER ORDERED that the authority granted herein for the applicant to establish channels of communication between the earth stations in Alaska and Russia via AURORA-II satellite does not dispense with the requirement that all such earth stations shall be authorized

[1] In a letter dated June 22, 1993, the Department of State informed the Commission that U.S. obligations under Article XIV(d) of the INTELSAT Agreement had been met with respect to: 1) use of the Aurora II for provision of non-public switched services between the U.S. and the Russian Federation; and 2) use of the Aurora II satellite for the establishment of up to 100 64-kbps equivalent circuits interconnected with the PSN for the provision of switched services between the U.S. and the Russian Federation. *See* Letter dated June 22, 1993 from Steven W. Lett, Director for Satellite and Cable Policy, Bureau of International Communications and Information Policy, Department of State to George S. Li, Chief, International Facilities Division, Common Carrier Bureau, Federal Communications Commission.

under Title III of the Communications Act of 1934, as amended, to communicate with AURORA-II satellite for the provision of the service(s) authorized herein.

10. This order is issued pursuant to 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the public notice date of this order (*See* Section 1.4 (b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SATELLITE TECHNOLOGY MANAGEMENT, INC. File No. I-T-C-93-043

Application for authority to acquire and operate facilities for provision of various international services.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: July 8, 1993; Released: July 26, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to §214 of the Communications Act of 1934, as amended, by Satellite Technology Management, Inc. (STM) IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-043 IS GRANTED, and STM is authorized to:

a. lease from Comsat and operate 4 T-1 and 17 64-kbps half-circuits between an appropriately licensed earth station on the east coast of North America and an appropriate satellite over the Atlantic Ocean and 1 T-1 circuit between an appropriately licensed earth station on the west coast of the United States mainland and an appropriate satellite over the Pacific Ocean;

b. lease and operate 4 T-1 and 17 64-kbps circuits in the appropriately licensed east coast earth station and 1 T-1 circuit in the appropriately licensed west coast earth station in the U.S. mainland;

c. lease and operate domestic connecting facilities between the east and west coast earth stations and STM's Costa Mesa, California Operating Center and a one-half interest in any necessary overseas connecting facilities;

d. use the facilities described in a, b and c above to provide international switched voice, data, fax and private-line telecommunications services between the U.S. and the following points;

Country	Satellite	No. of half-circuits
Brazil	AOR	1 T-1
Colombia	AOR	3 64-kbps
Ecuador	AOR	1 T-1
Germany	AOR	4 64-kbps
Iran	AOR	1 T-1
Italy	AOR	4 64-kbps
Mexico	AOR	1 T-1
Peru	AOR	2 64-kbps
Philippines	POR	1 T-1
Spain	AOR	2 64-kbps
Venezuela	AOR	2 64-kbps

e. leased from Comsat and establish channels of communication between appropriately licensed U.S. earth stations and INTELSAT satellites for the provision of IBS and associated digital video services between the U.S. and countries listed in Comsat's Tariff F.C.C. No. 103 for the space segment of IBS and international video service. Provided, however, this blanket Section 214 authorization is without commitment as to the Commission's action on any IBS or television Title III application that STM may file in the future;

f. lease from PanAmSat and operate 16 64-kbps half-circuits between an appropriately licensed U.S. earth station and PAS-1;

g. lease and operate 16 64-kbps circuits in the appropriately licensed U.S. earth station;

h. acquire and operate connecting facilities between the U.S. earth station and STM's Costa Mesa, California office; and

i. use the facilities described in f, g and h above to provide international private line services between the U.S. and the following points:[1]

Country	No. of PAS-1 half-circuits (64-kbps)
Brazil	4
Colombia	2
Ecuador	2
Mexico	4
Peru	2
Venezuela	2

3. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services the applicant seeks authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

4. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreement it enters into with its foreign correspondents with the Commission within 30

[1] We note that should the applicant obtain any interest in facilities beyond the international points authorized in paragraphs d, e and i for the purpose of providing common carrier services, including private line service, between the U.S. and other international points, such action would constitute an extension of line under Section 214 of the Act. Therefore, under the provisions of the Commission's *International Competitive Carrier Policies*, 102 FCC 2d 812 (1985), *recon. denied*, 60 R.R. 2d 1435 (1986), it would be necessary for applicant to file additional applications for a certificate of public convenience and necessity under Section 214 to begin service to each additional country and for authority to acquire any facilities needed to provide service to such additional points.

days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

5. IT IS FURTHER ORDERED that our authorization of STM to provide private lines is limited to the provision of such private lines only between the United States and those countries listed in paragraphs d, i and Comsat's IBS tariff -- that is, private lines which originate in the United States and terminate in those foreign countries or which originate in those foreign countries and terminate in the United States. In addition, STM may not -- and STM's tariff must state that STM's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international basic communications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the foreign administration affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates,* Phase II, First Report and Order, 7 FCC Rcd 559 (1991), and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending.*

6. IT IS FURTHER ORDERED that neither STM nor any persons or companies directly or indirectly controlling or controlled by STM, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which STM or any persons or companies controlling or controlled by STM are parties.

7. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

8. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

9. IT IS FURTHER ORDERED that the applicant shall file the circuit addition reports required by Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b) for any additional circuits acquired on INTELSAT Satellite Systems.

10. IT IS FURTHER ORDERED that the applicant shall file an application pursuant to Section 214 of the Communications Act, 47 U.S.C. §214, before adding any circuits or channel of communications for the provision of service over the PAS-1 satellite system.

11. This authorization is not to be construed as permitting the provision of any services between earth stations located within the United States.

12. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities
Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY
GTE HAWAIIAN TELEPHONE
COMPANY INCORPORATED
MCI INTERNATIONAL, INC.
SPRINT COMMUNICATIONS File No. SCL-93-001
COMPANY
LIMITED PARTNERSHIP
TELEFONICA LARGA DISTANCIA
DE PUERTO RICO
THE ST. THOMAS AND SAN JUAN
TELEPHONE COMPANY, INC.
TRT/FTC COMMUNICATIONS, INC.
WORLD COMMUNICATIONS, INC.

Joint Application for a License to Land and Operate a High Capacity Digital Submarine Cable System Between and Among the United States Mainland, Mexico, U.S. Virgin Islands, Spain, Italy and Portugal

CABLE LANDING LICENSE

Adopted: July 13, 1993; Released: July 26, 1993

By the Acting Chief, Common Carrier Bureau:

1. On November 10, 1992, eight United States international service carriers (hereinafter referred to as Joint Applicants)[1] filed the above-captioned Joint Application requesting authority pursuant to "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. §§ 34-39, to land and operate a high capacity digital submarine cable system known as the COLUMBUS II Cable System, extending from Mexico, to the U.S. mainland, then to the U.S. Virgin Islands (U.S.V.I.), then across the Atlantic Ocean to a branching unit which extends both to Spain and to another branching unit which extends to Italy and to Portugal. Segments of the COLUMBUS II Cable System operating between the U.S. mainland and the U.S.V.I. will be used in tandem with corresponding segments on the AMERICAS-1 Cable System (FCC File Nos. SCL-93-002, ITC-93-030), permitting the balancing of traffic and sharing of restoration capabilities between the two cable systems. These combined segments will be known as the "Common Segment."[2]

2. The Joint Application was placed on public notice on November 18, 1992. STC Submarine Systems, Inc. (STC) filed comments requesting the Commission to condition the requested Section 214 authorization and accompanying cable landing license on the Joint Applicants' competitive procurement of equipment and services for COLUMBUS II. AT&T and STSJ filed a joint reply. On March 12, 1993, AT&T filed a letter requesting the Commission to bifurcate the proceeding, and consider TLD's ownership interest apart from the other Joint Applicants.[3] TLD opposed AT&T's request, and AT&T responded. On May 7, 1993, the Commission, in a public notice, requested additional comments on AT&T's request. MCII and TLD filed comments, and AT&T and TLD filed reply comments.

The COLUMBUS II Cable System

3. The proposed COLUMBUS II Cable System will extend from a landing point at a new cable station at Cancun, Mexico, to the cable station at West Palm Beach, Florida, to the cable station at Magens Bay, St. Thomas, U.S.V.I., then across the Atlantic Ocean to a branching unit which extends to the cable station at Sardina, Spain, and to another branching unit which extends both to the cable station at Palermo, Italy and to the cable station at Funchal, Portugal. Between Florida and St. Thomas there will be a "Common Segment" which will permit the sharing of capacity and restoration capabilities between the COLUMBUS II and AMERICAS-1 Cable Systems. The proposed cable system consists of nine segments.[4] The

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[1] The Joint Applicants include American Telephone and Telegraph Company (AT&T), GTE Hawaiian Telephone Company Incorporated (HTC), MCI International, Inc. (MCII), Sprint Communications Company Limited Partnership (Sprint), Telefonica Larga Distancia de Puerto Rico (TLD), The St. Thomas and San Juan Telephone Company, Inc. (STSJ), TRT/FTC Communications, Inc. (TRT/FTC), and World Communications, Inc. (Worldcom).

[2] *See infra* n.4.

[3] Letter from Elaine R. McHale, Senior Attorney for AT&T, to Donna Searcy, Secretary of the FCC, dated March 12, 1993. AT&T's letter referenced a previously filed request by Sprint on January 19, 1993 that the Commission consider in future proceedings involving TLD both the general issue of reciprocal entry rights, and the issue of how Spain's treatment of U.S. carriers may affect grant of additional Section 214 authority to Spanish-owned carriers.

[4] The Joint Application identifies these as: Segments T1, T2, T3, T4, T5 and T6, which are, respectively, the cable station at Cancun, Mexico; the cable station in West Palm Beach, Florida; the cable station at Magens Bay, St. Thomas, U.S.V.I.; the cable station at Sardina, Spain; the cable station at Palermo, Italy; and the cable station at Funchal, Portugal; Segment A -- the submarine cable linking Segments T1 and T2; Segment B -- the submarine cable linking Segments T2 and T3; and Segment C -- the submarine cables linking Segments T3, T4, T5 and T6.

The portions of COLUMBUS II and AMERICAS-1 identified as the Common Segment are: (a) COLUMBUS II -- Segment B, and parts of Segments T2 and T3 of that system (b) AMERICAS-1 -- Segments N, T1 and part of T2 of that system (*see* AMERICAS-1 Section 214 authorization, DA 93-911, adopted July 13, 1993, for description of AMERICAS-1 segments); and (c) Segment L, a terrestrial fiber optic cable linking the Vero Beach (AMERICAS-1) and West Palm Beach (COLUMBUS II) cable stations. Because Segment L consists of a domestic facility, the Joint Applicants do not include it for purposes of this authorization as belonging to either the AMERICAS-1 or COLUMBUS II Cable Systems.

Common Segments B and N will be comprised of 2 fiber pairs each employing AT&T's latest SL2000 technology, operating at 2.4 Gigabits per second (Gbps). One fiber pair in each segment will be used for service while the other will be used for restoration. The Joint Applicants will have their traffic on the common segment balanced between Segments B and N in order to minimize circuit failures in the event of a disruption to either cable. In addition, by having a fully redundant restoration pair, 100% fiber-on-fiber restoration and route diversity is possible between Florida and St. Thomas on both COLUMBUS II and AMERICAS-1, resulting in high circuit reliability.

4. Segments A and C of the COLUMBUS II Cable System will employ technology operating at 560 Megabits per second (Mbps). Unless otherwise noted, the fiber pairs in these segments will be active, with none reserved for restoration. Segment A will consist of two fiber pairs. Subsegment C1, between St. Thomas and the First Branching Unit (BU1), will consist of three fiber pairs. Subsegment C2, between BU1 and Sardina, Spain, will consist of four fiber pairs, with one fiber pair reserved for restoration. Subsegment C3, between BU1 and the Second Branching Unit (BU2), will consist of two fiber pairs. Subsegments C4 and C5, between BU1 and Palermo, Italy, and between BU2 and Funchal, Portugal, respectively, will consist of one fiber pair each. The COLUMBUS II terminal equipment will employ the CCITT Recommendation G.703 paragraph 9.1 (Blue Book Vol. III, *Fascicle* III.4 November 1989) interface at 139,264,000 bits per second (140 Mbps) which is the Basic System Module (BSM).[5]

5. The design capacity of the COLUMBUS II Cable System Segments A, B, and C is as follows:

SEGMENT OR SUBSEGMENT	NUMBER OF BASIC SYSTEM MODULES	NUMBER OF MIUs[6] (DESIGN)	NUMBER OF 64 kbps VOICE PATHS
A	8	504	15,120
B	32	2016	60,480
C1	12	756	22,680
C2	16	1008	30,240
C3	8	504	15,120
C4	4	252	7,560
C5	4	252	7,560

6. The proposed cable system will be jointly owned by the Joint Applicants and foreign telecommunications entities in the following countries: Argentina, Aruba, Australia, Austria, Barbados, Belgium, Brazil, Canada, Chile, China, Colombia, Costa Rica, Dominican Republic, El Salvador, France, Germany, Guatemala, Guyana, Haiti, Honduras, Hong Kong, India, Italy, Japan, Korea, Mexico, Netherlands, Netherlands Antilles, Nicaragua, Panama, Paraguay, Philippines, Portugal, Singapore, Spain, Sweden, Switzerland, Trinidad and Tobago, Taiwan, the United Kingdom, Uruguay and Venezuela.

7. Although expressly supporting the construction of COLUMBUS II, STC requests the Commission to condition approval of the cable landing license and accompanying Section 214 authorization by requiring the Joint Applicants to use a fair and open procurement process in awarding the construction contracts for COLUMBUS II as it did in *Pacific Telecom Cable*.[7] As detailed in the companion Section 214 authorization of COLUMBUS II, given competitive market circumstances, we can find no public interest benefit to involving the Commission in the management of the COLUMBUS II procurement decisions and do not believe that it is necessary to condition the grant of COLUMBUS II on assurances of competitive procurement practices.[8]

8. Pursuant to our obligations under 47 U.S.C. §§ 34-39, the Department of State has been notified and, after having coordinated with the National Telecommunications and Information Administration and the Defense Information System Agency, has approved the landing of COLUMBUS II in the United States on the condition that approval of TLD's ownership interests in that portion of the cable system designated for service to Spain be deferred pending further review.[9]

9. Based on the information provided by the Joint Applicants, we conclude that the grant of the requested authorization will not have a significant effect on the environment as defined in Section 1.1307 of the Commission's Rules and Regulations implementing the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4335 (1976).[10] Consequently, no environmental assessment is required to be submitted with this Joint Application under Section 1.1311 of the Commission's Rules.

10. Concurrent with consideration of this application, this Commission has granted the Joint Applicants authority under Section 214 of the Communications Act of 1934, as amended, to construct and operate the COLUMBUS II Cable System.[11] As detailed in the companion Section 214 authorization of COLUMBUS II, we find that the proposed COLUMBUS II Cable System is in the public interest. However, we incorporate by reference our findings there that consideration of TLD's proposed ownership interest shall be deferred to a separate proceeding. Therefore, we grant to the Joint Applicants, except TLD, a cable landing license for the COLUMBUS II Cable System.

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[5] Each BSM consists of 63 Minimum Investment Units (MIUs).

[6] A MIU is the minimum unit of investment for ownership in the AMERICAS-1 Cable network, allowing the use of 2.048 Mbps and the additional approximately 421 kilobits per second (kbps) required for multiplexing in each direction. Each MIU includes thirty 64 kbps voice paths. For voice services, digital circuit multiplication equipment (DCME) can be employed to derive about 150 virtual voice paths from a MIU.

[7] *Pacific Telecom Cable, Inc.*, 2 FCC Rcd 2686 (1987) (Conditional license); 4 FCC Rcd 8061 (1989) (Final license).

[8] *See* COLUMBUS II Section 214 authorization, DA 93-910, adopted July 13, 1993.

[9] Letter from Michael T.N. Fitch, Acting U.S. Coordinator and Director, Bureau of International Communications and Information Policy, Department of State to Kathleen Levitz, Acting Chief, Common Carrier Bureau, Federal Communications Commission, dated June 30, 1993.

[10] *See* Section 214 Application, File No. ITC-93-029, at p. 23.

[11] *See supra* n.8.

ORDERING CLAUSES

11. Accordingly, this Commission HEREBY GRANTS AND ISSUES under the provisions of "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. §§ 34-39, and pursuant to authority delegated to this Commission under Executive Order No. 10530, dated May 10, 1954, 3 C.F.R. 1954-1958, Comp., p. 189 (1961), *reprinted in* 3 U.S.C.A. § 301 at 1052 (1985), to Joint Applicants AT&T, HTC, MCII, Sprint, STSJ, TRT/FTC, and Worldcom a license to land and operate one high capacity digital submarine cable system, having a capacity of: (a) 2.4 Gbps on each of two fiber pairs, extending between West Palm Beach, Florida and St. Thomas, U.S. Virgin Islands, (b) 560 Mbps on two fiber pairs between Cancun, Mexico and West Palm Beach, Florida, (c) 560 Mbps on three fiber pairs between Magens Bay, St. Thomas and the First Branching Unit (BU1), (d) 560 Mbps on four fiber pairs between BU1 and Sardina, Spain, (e) 560 Mbps on two fiber pairs between BU1 and the Second Branching Unit (BU2), (f) 560 Mbps on each single fiber pair between BU2 and Funchal, Portugal, and BU2 and Palermo, Italy. This license is subject to: (1) "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. §§34-39; (2) the Communications Act of 1934, as amended, 47 U.S.C. §§151-609; (3) subsequent applicable acts; (4) all relevant rules and regulations of the Federal Communications Commission; (5) any treaties or conventions to which the United States of America is now or may hereafter become a party; (6) any actions by the Commission or the Congress of the United States of America rescinding, changing, modifying, or amending any rights accruing to any person; and (7) the following conditions:

(1) The location of the cable within the territorial waters of the United States of America, its territories and possessions, and upon the foreshore thereof, shall be in conformity with plans approved by the Secretary of the Army, and the cable shall be moved or shifted by the Licensees at their expense upon the request of the Secretary of the Army whenever he or she considers such course necessary in the public interest, for reasons of national defense, or for the maintenance or improvement of harbors for navigational purposes;

(2) The Licensees shall at all times comply with any requirements of United States Government authorities regarding the location and concealment of the cable facilities, buildings, and apparatus with a view to protecting and safeguarding the cable from injury or destruction by enemies of the United States of America;

(3) The Licensees or any persons or companies controlling them or controlled by them do not enjoy and shall not acquire any right, for the purpose of handling traffic to or from the United States, its territories or possessions, to land, connect or operate cables or landlines, to construct or operate radio stations, or to interchange traffic, which is denied to any other United States company by reason of any concession, contract, understanding, or working arrangement to which the Licensees or any persons or companies controlling them or controlled by them are parties;

(4) Neither this license, nor the rights granted herein, shall be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of or disposed of indirectly by transfer of control of the Licensees to any persons, unless the Federal Communications Commission shall give prior consent in writing;

(5) This license is revocable after due notice and opportunity for hearing by the Federal Communications Commission in the event of breach or nonfulfillment of any requirement specified in Section 2 of "An Act Relating to the Operation of Submarine Cables in the United States," 47 U.S.C. §§34-39, or for failure to comply with the terms of the authorization;

(6) The Licensees shall notify the Commission in writing of the date on which the cable is placed in service; and this license shall expire 25 years from that date, unless renewed or extended upon proper applications duly filed no less than six months prior to the expiration date; and, upon expiration of the license, all rights granted under it shall be terminated; and

(7) The terms and conditions upon which this license is given shall be accepted by the Licensees by filing a letter with the Secretary, Federal Communications Commission, Washington, D.C. 20554, within 30 days of the release of this order.

12. IT IS FURTHER ORDERED that STC's request to condition the COLUMBUS II cable landing license is hereby denied.

13. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY
GTE HAWAIIAN TELEPHONE COMPANY INCORPORATED
MCI INTERNATIONAL, INC.
SPRINT COMMUNICATIONS COMPANY
LIMITED PARTNERSHIP
TELEFONICA LARGA DISTANCIA DE PUERTO RICO
THE ST. THOMAS AND SAN JUAN TELEPHONE COMPANY, INC.
TRT/FTC COMMUNICATIONS, INC.
WORLD COMMUNICATIONS, INC.

File No. SCL-93-002

Joint Application for a License to Land and Operate a High Capacity Digital Submarine Cable System Between and Among the United States Mainland, U.S. Virgin Islands, Brazil, Trinidad and Venezuela

CABLE LANDING LICENSE

Adopted: July 13, 1993; **Released: July 26, 1993**

By the Acting Chief, Common Carrier Bureau:

1. On November 10, 1992, eight United States international service carriers (hereinafter referred to as Joint Applicants)[1] filed the above-captioned Joint Application requesting authority pursuant to "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. §§ 34-39, to land and operate a high capacity digital submarine cable system known as the AMERICAS-1 Cable System, extending from the U.S. mainland to the U.S. Virgin Islands (U.S.V.I.), then to a branching unit which extends to both Brazil and Trinidad and then to Venezuela. Segments of the AMERICAS-1 Cable System operating between the U.S. mainland and the U.S.V.I. will be used in tandem with corresponding segments on the COLUMBUS II Cable System (FCC File Nos. SCL-93-001, ITC-93-029), permitting the balancing of traffic and sharing of restoration capabilities between the two cable systems. These combined segments will be known as the "Common Segment."[2]

2. The Joint Application was placed on public notice on November 18, 1992. No comments were received. On March 12, 1993, AT&T filed a letter requesting the Commission to bifurcate the proceeding, and consider TLD's ownership interest apart from the other Joint Applicants.[3] TLD opposed AT&T's request, and AT&T responded. On May 7, 1993, the Commission, in a public notice, requested additional comments on AT&T's request. MCII and TLD filed comments, and AT&T and TLD filed reply comments. For the reasons discussed below, we partially grant this application.

The AMERICAS-1 Cable System

3. The proposed AMERICAS-1 Cable System will land at Vero Beach, Florida in the United States and extend to Magens Bay, St. Thomas, U.S.V.I., then to a branching unit which extends to both Fortaleza, Brazil and Macqueripe, Trinidad, and then to Camuri, Venezuela. The proposed cable system consists of seven segments.[4] The Common Segments B and N will be comprised of 2 fiber pairs, each employing AT&T's latest SL2000 technology, operating at 2.4 Gigabits per second (Gbps). One fiber pair in each segment will be used for service while the other will be used for restoration. The Joint Applicants will have their traffic on the common segment balanced between Segments B and N in order to minimize circuit failures in the event of a disruption to either cable. In addition, by having a fully redundant restoration pair, 100% fiber-on-fiber res-

[1] The Joint Applicants include American Telephone and Telegraph Company (AT&T), GTE Hawaiian Telephone Company Incorporated (HTC), MCI International, Inc. (MCII), Sprint Communications Company Limited Partnership (Sprint), Telefonica Larga Distancia de Puerto Rico (TLD), The St. Thomas and San Juan Telephone Company, Inc. (STSJ), TRT/FTC Communications, Inc. (TRT/FTC), and World Communications, Inc. (Worldcom).

[2] *See infra* n.4.

[3] Letter from Elaine R. McHale, Senior Attorney for AT&T, to Donna Searcy, Secretary of the FCC, dated March 12, 1993. AT&T's letter referenced a previously filed request by Sprint on January 19, 1993 that the Commission consider in future proceedings involving TLD both the general issue of reciprocal entry rights, and the issue of how Spain's treatment of U.S. carriers may affect grant of additional Section 214 authority to Spanish-owned carriers.

[4] The Joint Application identifies these as: Segments T1, T2, T3, T4 and T5, which are, respectively, the cable station at Vero Beach, Florida; the cable station at Magens Bay, St. Thomas, U.S.V.I.; the cable station at Macqueripe, Trinidad; the cable station at Camuri, Venezuela; and the cable station at Fortaleza, Brazil; Segment N -- the submarine cable linking Segments T1 and T2; and Segment S -- the submarine cables linking Segments T2, T3, T4, and T5.

The portions of AMERICAS-1 and COLUMBUS II identified as the Common Segment are: (a) AMERICAS-1 -- Segments N, T1 and part of T2; (b) COLUMBUS II -- Segment B, and parts of Segments T2 and T3 of that system (*see* COLUMBUS II Section 214 authorization, DA 93-910, adopted July 13, 1993, for description of COLUMBUS II segments); and (c) Segment L, a terrestrial fiber optic cable linking the Vero Beach (AMERICAS-1) and West Palm Beach (COLUMBUS II) cable stations. Because Segment L consists of a domestic facility, the Joint Applicants do not include it for purposes of authorization as belonging to either the AMERICAS-1 or COLUMBUS II Cable Systems.

toration and route diversity is possible between Florida and St. Thomas on both AMERICAS-1 and COLUMBUS II, resulting in high circuit reliability.

4. Segment S of the AMERICAS-1 Cable System, which will link the St. Thomas cable station with all of the foreign cable stations, will employ technology operating at 560 Megabits per second (Mbps). All of the fiber pairs in Segment S will be active, with none reserved for restoration. Subsegments S1 and S2, between St. Thomas and the Branching Unit (BU), and the BU and Macqueripe, Trinidad respectively, will consist of three fiber pairs. Subsegments S3 and S4, between Macqueripe, Trinidad and Camuri, Venezuela, and the BU and Fortaleza, Brazil respectively, will consist of two fiber pairs. The AMERICAS-1 terminal equipment will employ the CCITT Recommendation G.703 paragraph 9.1 (Blue Book Vol. III, *Fascicle* III.4 November 1989) interface at 139,264,000 bits per second (140 Mbps) which is the Basic System Module (BSM).[5]

5. The Design Capacity of the AMERICAS-1 Cable System Segments N and S are as follows:

SEGMENT OR SUBSEGMENT	NUMBER OF BASIC MODULES SYSTEM	NUMBER OF MIUs[6] (DESIGN)	NUMBER OF 64 kbps VOICE PATH
N	32	2016	60,480
S1	12	756	22,680
S2	12	756	22,680
S3	8	504	15,120
S4	8	504	15,120

6. The proposed cable system will be jointly owned by the Joint Applicants and foreign telecommunications entities in the following countries: Argentina, Aruba, Australia, Austria, Barbados, Belgium, Brazil, Canada, Chile, Colombia, Dominican Republic, El Salvador, France, Germany, Guatemala, Guyana, Haiti, Honduras, Hong Kong, India, Italy, Japan, Korea, Mexico, Netherlands, Netherlands Antilles, Nicaragua, Panama, Paraguay, Philippines, Portugal, Singapore, Spain, Sweden, Switzerland, Trinidad and Tobago, Taiwan, the United Kingdom, Uruguay and Venezuela.

7. Pursuant to our obligations under 47 U.S.C. §§ 34-39, the Department of State has been notified and, after having coordinated with the National Telecommunications and Information Administration and the Defense Information System Agency, has approved the landing of AMERICAS-1 in the United States on the condition that approval of TLD's ownership interests in that portion of the cable system designated for service to Spain be deferred pending further review.[7]

8. Based on the information provided by the Joint Applicants, we conclude that the grant of the requested authorization will not have a significant effect on the environment as defined in Section 1.1307 of the Commission's Rules and Regulations implementing the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4335 (1976).[8] Consequently, no environmental assessment is required to be submitted with this Joint Application under Section 1.1311 of the Commission's Rules.

9. Concurrent with consideration of this application, this Commission has granted the Joint Applicants authority under Section 214 of the Communications Act of 1934, as amended, to construct and operate the AMERICAS-1 Cable System (DA 93-911, adopted July 13, 1993, File No. I-T-C-93-030). As detailed in the companion Section 214 authorization of AMERICAS-1, we find that the proposed AMERICAS-1 Cable System is in the public interest. However, we also incorporate by reference our findings there that consideration of TLD's proposed ownership interest shall be deferred to a separate proceeding. Therefore, we grant to the Joint Applicants, except TLD, a cable landing license for the AMERICAS-1 Cable System.

ORDERING CLAUSES

10. Accordingly, this Commission HEREBY GRANTS AND ISSUES under the provisions of "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. §§ 34-39, and pursuant to authority delegated to this Commission under Executive Order No. 10530, dated May 10, 1954, 3 C.F.R. 1954-1958, Comp., p. 189 (1961), *reprinted in* 3 U.S.C.A. § 301 at 1052 (1985), to Joint Applicants AT&T, HTC, MCII, Sprint, STSJ, TRT/FTC, and Worldcom a license to land and operate one high capacity digital submarine cable system, having a capacity of: (a) 2.4 Gbps on each of two fiber pairs, extending between Vero Beach, Florida and St. Thomas, U.S. Virgin Islands, (b) 560 Mbps on each of three fiber pairs between St. Thomas and the Branching Unit (BU), and the BU and Macqueripe, Trinidad, and (c) 560 Mbps on each of two fiber pairs between Macqueripe, Trinidad and Camuri, Venezuela, and the BU and Fortaleza, Brazil. This license is subject to: (1) "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. §§34-39; (2) the Communications Act of 1934, as amended, 47 U.S.C. §§151-609; (3) subsequent applicable acts; (4) all relevant rules and regulations of the Federal Communications Commission; (5) any treaties or conventions to which the United States of America is now or may hereafter become a party; (6) any actions by the Commission or the Congress of the United States of America rescinding, changing, modifying, or amending any rights accruing to any person; and (7) the following conditions:

(1) The location of the cable within the territorial waters of the United States of America, its territories and possessions, and upon the foreshore thereof, shall

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[5] Each BSM consists of 63 Minimum Investment Units (MIUs).

[6] A MIU is the minimum unit of investment for ownership in the AMERICAS-1 Cable System, allowing the use of 2.048 Mbps and the additional approximately 421 kilobits per second (kbps) required for multiplexing in each direction. Each MIU includes thirty 64 kbps voice paths. For voice services, digital circuit multiplication equipment (DCME) can be employed to derive about 150 virtual voice paths from a MIU.

[7] Letter from Michael T.N. Fitch, Acting U.S. Coordinator and Director, Bureau of International Communications and Information Policy, Department of State to Kathleen Levitz, Acting Chief, Common Carrier Bureau, Federal Communications Commission, dated June 30, 1993.

[8] *See* Section 214 Application, File No. ITC-93-030, at p. 25.

be in conformity with plans approved by the Secretary of the Army, and the cable shall be moved or shifted by the Licensees at their expense upon the request of the Secretary of the Army whenever he or she considers such course necessary in the public interest, for reasons of national defense, or for the maintenance or improvement of harbors for navigational purposes;

(2) The Licensees shall at all times comply with any requirements of United States Government authorities regarding the location and concealment of the cable facilities, buildings, and apparatus with a view to protecting and safeguarding the cable from injury or destruction by enemies of the United States of America;

(3) The Licensees or any persons or companies controlling them or controlled by them do not enjoy and shall not acquire any right, for the purpose of handling traffic to or from the United States, its territories or possessions, to land, connect or operate cables or landlines, to construct or operate radio stations, or to interchange traffic, which is denied to any other United States company by reason of any concession, contract, understanding, or working arrangement to which the Licensees or any persons or companies controlling them or controlled by them are parties;

(4) Neither this license, nor the rights granted herein, shall be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of or disposed of indirectly by transfer of control of the Licensees to any persons, unless the Federal Communications Commission shall give prior consent in writing;

(5) This license is revocable after due notice and opportunity for hearing by the Federal Communications Commission in the event of breach or nonfulfillment of any requirement specified in Section 2 of "An Act Relating to the Operation of Submarine Cables in the United States," 47 U.S.C. §§34-39, or for failure to comply with the terms of the authorization;

(6) The Licensees shall notify the Commission in writing of the date on which the cable is placed in service; and this license shall expire 25 years from that date, unless renewed or extended upon proper applications duly filed no less than six months prior to the expiration date; and, upon expiration of the license, all rights granted under it shall be terminated; and

(7) The terms and conditions upon which this license is given shall be accepted by the Licensees by filing a letter with the Secretary, Federal Communications Commission, Washington, D.C. 20554, within 30 days of the release of this order.

11. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

COMMUNITY SERVICE BROADCASTING, INC.
For Extension of Time
to Construct KDGB(FM),
Dodge City, Kansas — File No. BMPH-880808JZ

COMMUNITY SERVICE BROADCASTING, INC.
Assignor — File No. BAPH-880609HB

and

LESSO, INC.
Assignee

For Assignment of
Construction Permit for
KDGB(FM), Dodge City,
Kansas

MEMORANDUM OPINION AND ORDER

Adopted: July 9, 1993; Released: July 26, 1993

By the Commission:

1. In a *Memorandum Opinion and Order, Community Service Broadcasting, Inc.*, 7 FCC Rcd 5652 (1992), the Commission denied an application for review filed by Charles C. Babbs ("Babbs"). By denying review, the Commission affirmed the Mass Media Bureau's approval of the above-captioned applications for an extension of the construction period for KDGB(FM), Dodge City, Kansas, and for consent to assign the construction permit from Community Service Broadcasters ("CSB") to Lesso, Inc. ("Lesso"). Now before the Commission are a petition for reconsideration filed October 5, 1992, by Babbs and an opposition filed on October 15, 1992, by CSB.

2. A petition for reconsideration of the Commission's denial of an application for review will be entertained only if one or more of the following circumstances are present:

> (i) The petition relies on facts which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters; or
>
> (ii) The petition relies on facts unknown to petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity.

47 C.F.R. § 1.106(b)(2). Babbs contends that the Commission should reconsider its decision based on "new developments" which have occurred since he filed his application for review. Specifically, Babbs now asserts that the Commission should deny or dismiss the subject assignment application because the agreement between CSB and Lesso for the sale of the construction permit for KDGB(FM) is no longer in effect. Babbs' assertion is purportedly based upon the testimony of a CSB principal in a separate civil action which indicates that CSB refunded to Lesso money held in escrow while Babbs' application for review of the Mass Media Bureau's denial of his petition to deny the subject applications was pending.

3. However, in response to a staff inquiry, the parties submitted a declaration confirming that they intend to consummate the sale transaction when grant of the assignment application becomes final. Therefore, Babbs' contention that CSB and Lesso are no longer interested in the transaction, based upon the return of the escrow, is unfounded. Moreover, we decline to draw any adverse inference from the parties' decision to defer consummation of this transaction while matters are litigated before the Commission and the courts. This course of action is reasonable given that parties who consummate a sale transaction before its approval becomes final assume the risk that the sale may later be set aside by the Commission or the courts. *See, e.g., Improvement Leasing Co.*, 73 FCC 2d 676, 684 (1979), *aff'd sub nom. Washington Association for Television and Children v. FCC*, 665 F.2d 1264 (D.C. Cir. 1981).[1] Consequently, although Babbs relies on facts relating to events that have occurred or circumstances that have changed since his application for review was filed, these facts are not a basis for reconsideration. Because Babbs fails to otherwise demonstrate error in the Commission's decision

[1] Babbs was given the opportunity to respond to the parties' statement that they intend to consummate the transaction. Babbs asserts that the parties' real intentions with respect to closing this transaction are still in doubt based on recent newspaper reports that Lesso plans to seek Commission consent to acquire an AM/FM combination licensed to Dodge City. Babbs contends that these planned acquisitions would be inconsistent with Lesso's ultimate ownership of KDGB(FM) because the Commission's local ownership rules, 47 C.F.R. § 73.3555, prohibit Lesso's ownership of three stations in the market. Babbs argues that Lesso would not negotiate a contract for the acquisition of additional stations in the Dodge City market unless it intended to abandon its plans to acquire KDGB(FM). We note that on June 8, 1993, Lesso filed an application to acquire KGNO(AM)/KDCK-FM, Dodge City, Kansas, File Nos. BAL-930608GG, BALH-930608GH. Lesso does not propose to divest KDGB(FM) as a result of this transaction, and has in fact submitted a showing designed to demonstrate that its ownership of the three stations is permissible under the Commission's radio local ownership rules. Given Lesso's consistently expressed intent, Babbs' speculation does not constitute a basis for reconsideration. Furthermore, effectuation of Lesso's intent does not appear to be facially inconsistent with our multiple ownership rules. Additionally, any question as to Lesso's alleged noncompliance with our multiple ownership rules will be considered and resolved in connection with the application for the acquisition of KGNO(AM)/KDCK-FM.

denying his application for review, Babbs has advanced no basis for granting reconsideration and his petition will therefore be denied.

4. Accordingly, IT IS ORDERED THAT, pursuant to 47 C.F.R. § 1.106(b), the petition for reconsideration filed October 5, 1992 by Charles C. Babbs IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-132

In the Matter of

Competition in the Interstate
Interexchange Marketplace

Petitions for Modification
of Fresh Look Policy

MEMORANDUM OPINION AND ORDER

Adopted: July 15, 1993; Released: July 26, 1993

By the Commission:

I. INTRODUCTION

1. On November 6, 1992, the Ad Hoc Telecommunications Users Committee (Ad Hoc) petitioned the Commission requesting extension of the "fresh look" policy that was adopted in the Commission's August 1, 1991 *Report and Order* in *Interexchange Proceeding*.[1] Ad Hoc asks that the "fresh look" period be extended until ninety days after implementation of certain technology, currently scheduled for deployment in May 1994. On December 2, 1992, Sprint Communications Company LP (Sprint) filed an emergency petition for declaratory ruling asking the Commission to revise its "fresh look" policy by extending it from 90 to 180 days and expanding it to include all of AT&T's 800 term plans.[2] For the reasons stated below, we deny both petitions.

II. BACKGROUND

A. The Interexchange Proceeding

2. In the *Report and Order*, we found that AT&T maintained a market advantage in the provision of 800 and inbound services due to the lack of 800 number portability.[3] We found that AT&T had a large embedded base of 800 service customers, many of whom were "captive" -- *i.e.*, they were unable to change 800 numbers without incurring substantial costs. We found further that AT&T had a unique ability to leverage its market power in 800 and inbound services by bundling these services with other services. In particular, we found that through bundling, AT&T could use its market power over captive 800 service customers to gain an advantage in other markets. We found that this practice could have a significant impact on interexchange competition.[4]

3. Based on these findings, we prohibited AT&T from including 800 or inbound services in future contract-based tariffs or Tariff 12 integrated services packages until 800 numbers became portable.[5] In order to protect the expectancy interests of the customers of such options and to avoid causing these customers undue disruption during the relatively limited transition period to full number portability, however, we allowed Tariff 12 options on file as of August 1, 1991 to remain in effect, even if they included inbound service.[6] In addition, we provided that AT&T must permit customers with Tariff 12 packages that include inbound service to terminate these packages within ninety days of the time 800 numbers became portable without the imposition of any termination liabilities -- the so-called "fresh look" requirement.[7]

4. On April 17, 1992, we modified the bundling restrictions to prohibit AT&T from offering customers bundled service arrangements that included "old" 800 numbers (those numbers in use by the customer prior to April 17, 1992), and to apply to Tariff 16s and other tariffed service offerings that included 800 or inbound service. Likewise, we modified the the grandfathering provision to allow the customers of Tariff 12s, Tariff 16s, or other tariffed offerings with bundled 800 or inbound service, to continue to take service under those arrangements, provided that the customer had signed a final contract for service or begun taking service on or before April 16, 1992. Finally, we

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[1] Competition in the Interstate Interexchange Marketplace, *Report and Order*, CC Docket No. 90-132, 6 FCC Rcd 5880 (1991); *Order*, CC Docket No. 90-132, 6 FCC Rcd 7255 (Com. Car. Bur. 1991); *Memorandum Opinion and Order*, 6 FCC Rcd 7569 (1991) (*"Sua Sponte Reconsideration Order"*); *Memorandum Opinion and Order on Reconsideration*, 7 FCC Rcd 2677 (1992) (*"Reconsideration Order"*); *Memorandum Opinion and Order on Reconsideration*, 8 FCC Rcd 2659 (1993) (*"March 1993 Order"*); petitions for reconsideration pending; *Second Report and Order*, 8 FCC Rcd 3668 (1993) (*"Second Report"*).

[2] Public comment was solicited on both petitions. *See Public Notice*, CC Docket No. 90-132, DA 92-1639 (December 2, 1992); *Public Notice*, CC Docket No. 90-132, DA 92-1655 (December 7, 1992). Comments or oppositions were filed by: Ad Hoc; Aeronautical Radio, Inc. (ARINC); American Petroleum Institute (API); American Telephone and Telegraph Company (AT&T); Competitive Telecommunications Association (CompTel); Custom Network Services Users Group (CNSG); LDDS Communications, Inc. (LDDS); MCI Telecommunications Corporation (MCI); Sprint; and Telecommunications Resellers Association (TRA). Reply comments were filed by: Ad Hoc; AT&T; CNSG; MCI; Sprint; and United Air Lines, Inc. and Covia Partnership (United/Covia).

[3] *Report and Order*, 6 FCC Rcd at 5904. Prior to May 1, 1993, 800 numbers were not portable under local exchange network technology. As a result, a customer could not switch from one 800 service provider to another without also changing its 800 number.

[4] *Id.* at 5905-5906. *See also March 1993 Order*, 8 FCC Rcd 2659 (1993) (order denying AT&T petition to extend 800 bundling restriction to all interexchange carriers).

[5] *Id.* at 5905-5906.

[6] 6 FCC Rcd at 5906. We later revised the grandfathering date to include all Tariff 12 options on file as of September 1, 1991. *Sua Sponte Reconsideration Order*, 6 FCC Rcd 7569.

[7] 6 FCC Rcd at 5906.

reaffirmed the fresh look requirement and applied it to all grandfathered Tariff 12, Tariff 16, and other bundled service customers.[8]

B. The 800 Data Base Proceeding

5. As noted, fresh look rights were triggered by the implementation on May 1, 1993, of a new 800 data base system of 800 access which permits 800 number portability.[9] Under the 800 data base system, all 800 customer service records are loaded into a central data base known as the service management system (SMS). Records loaded into the SMS are then downloaded to the various LEC data bases around the country. The only entity authorized to input a new 800 customer service record or change an existing record in the SMS is the "responsible organization" or "RESPORG" designated by the customer.[10] In the event that multiple carriers provide service for a particular 800 number, the RESPORG for that record may not add traffic to another carrier's network without first notifying that carrier and obtaining its acceptance of the service order.[11] Initially, the industry will use manual notice-and-acceptance procedures. It is expected that automated procedures will replace these manual procedures in May 1994. Under the automated system being developed, carriers would be automatically notified when an 800 service order placed by another RESPORG would add service to their networks. The order would be placed on hold until these carriers signified their approval.[12]

III. THE PETITIONS

6. Ad Hoc asks the Commission to extend the "fresh look" period until at least ninety days after full implementation of a notice-and-acceptance functionality in the 800 data base Service Management System (SMS). Ad Hoc asserts that some large customers will not be able to take advantage of the "fresh look" policy during the current ninety-day time frame because they will not be able to move their traffic from AT&T to other carriers without an unacceptable risk of service disruption. Ad Hoc contends that minimizing this risk requires an automated notice-and-acceptance functionality in the SMS.[13]

7. Sprint asks the Commission to extend the "fresh look" period until 180 days after the implementation of 800 number portability. Sprint argues that the data base system represents a significant network change and that many customers may be reluctant to change carriers until they are satisfied that this system works as anticipated and that any changes will be implemented smoothly and seamlessly.[14] Sprint also claims that there are a number of unresolved issues relating to a subscriber's ability to use multiple 800 service providers, including: (1) the type of access carriers other than the RESPORG will have to customer records; (2) whether the SMS administrator may serve as a transfer agent for carriers other than the RESPORG; (3) whether area-of-service routing is classified as a basic service;[15] and (4) the procedures for notifying carriers of additions in 800 traffic.[16] Sprint argues, further, that AT&T, as part of a strategy to subvert 800 service competition, may refuse to enter multicarrier arrangements.[17] Finally, Sprint asserts that many customers have not been able to issue requests for proposals in time to complete negotiations for service prior to the end of the ninety-day "fresh look" window.[18]

8. Sprint also asks the Commission to extend the "fresh look" policy to all of AT&T's 800 term plan customers.[19] It argues that the same rationale used to justify "fresh look" for bundled packages -- AT&T's ability to leverage customers that had high costs of changing 800 numbers -- is equally applicable to all 800 service term plans. It claims that AT&T may have 50-75 percent of its business locked up in term plans and that customers of term plans may not have been aware when they entered into these arrangments that their 800 numbers would soon be portable. Sprint asks the Commission to allow customers of any AT&T service term plan with 800 numbers in use as of April 16, 1992 to discontinue service without any termination liability for 180 days after the availability of 800 number portability.[20]

IV. POSITIONS OF THE PARTIES

9. Several of AT&T's competitors and user groups filed comments. These parties generally support the measures asked for in the Ad Hoc and Sprint petitions. They believe that an extension is necessary to allow customers to gain confidence in the 800 data base system. Parties are split, however, as to the length of the extension that is needed. Parties attaching significant importance to the need for automated notice-and-acceptance procedures generally sup-

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[8] *Reconsideration Order*, 7 FCC Rcd 2677.

[9] On August 1, 1991, we adopted an order requiring local telephone companies to take steps that would permit 800 number portability by March of 1993. Provision of Access for 800 Service, *Memorandum Opinion and Order on Reconsideration*, 6 FCC Rcd 5421, 5425 (1991). On November 20, 1992, in response to technical concerns, we extended the deadline for mandatory data base access to May 1, 1993. Provision of Access for 800 Service, *Order*, CC Docket No. 86-10, 7 FCC Rcd 8616 (1992) (*"Extension Order"*). The orders in this proceeding are referred to collectively as the *"800 Data Base Proceeding."*

[10] Because each 800 number has its own record, a customer may select a different RESPORG for each 800 number it uses.

[11] This process is referred to as "notice-and-acceptance." *See* Bell Operating Companies, Tariff F.C.C. No. 1, 800 Service Management Systems Functions (filed March 5, 1993) (*SMS Tariff*) (Section 2.3.1 of the tariff outlines the responsibilities of RESPORGs)."

[12] *See, generally, Extension Order*, 7 FCC Rcd at 6-11; *SMS Tariff*. A "view only" function, currently scheduled for availablility in October 1993, will enable carriers other than the RESPORG serving a particular 800 number to view, without changing, the record associated with that number.

[13] Ad Hoc petition at 1-5.

[14] Sprint Petition at 4-5.

[15] Area-of-service routing is the routing of 800 calls by local exchange carriers to different interexchange carriers (IXCs) based on the local access transport area (LATA) where the call originates. Most regional IXCs rely on other carriers in offering nationwide 800 service. If area-of-service routing is a separately charged vertical feature, these carriers would be at a competitive disadvantage in comparison with IXCs that have nationwide networks.

[16] Sprint Petition at 5-6.

[17] Sprint Petition at 7-9.

[18] *Id.* at 9-10.

[19] 800 term plans refer to 800 or inbound service arrangements where the customer agrees to purchase the service for a specified period of time.

[20] *Id.* at 11-13.

port the longer Ad Hoc proposal.[21] MCI, on the other hand, supports the Sprint proposal. It urges the Commission to adopt the industry-approved manual notification and approval procedures and argues that the ninety additional days will allow customers to gain confidence in manual notice-and-acceptance procedures.[22] Many parties also ask the Commission to use its influence to speed the implementation of a notice-and-acceptance functionality in the SMS.[23] In addition, MCI indicates that some customers are concerned that AT&T will be unwilling to serve customers who wish to divide traffic among two or more carriers.[24] Finally, TRA and United/Covia agree with Sprint that many customers have not had sufficient time to complete the carrier selection process and migrate traffic to new carriers.[25]

10. Several parties also support Sprint's request that we extend "fresh look" to AT&T's 800 term plans, though they differ on the specifics. CompTel and MCI support Sprint's proposal to apply "fresh look" to AT&T term plans involving 800 numbers in use prior to April 16, 1992. Ad Hoc argues that "fresh look" should only be available to term plan customers with 800 numbers ordered prior to January 1987 -- the date when 800 competition began.[26] It argues that rather than trying to assess when AT&T competitive advantages disappeared, as Sprint's proposal does, "fresh look" should be available only to customers who obtained their 800 numbers at a time when AT&T was the only 800 service provider.[27] LDDS and TRA argue that, since a customer may have been "captive" to any carrier, "fresh look" should be applied to 800 term plans of all 800 service providers.[28]

11. AT&T opposes both the Ad Hoc and Sprint petitions. It argues that we have already concluded that 800 number portability would remove competitive barriers in 800 services. Thus, it argues, claims that the 800 market would not be truly competitive at that time are unfounded.[29] It states, further, that any concerns that customers may have about the reliability of the data base system are irrelevant to "fresh look" since data base access will be provided to all carriers, not just AT&T.[30] AT&T also argues that no party has raised any credible evidence that manual notice-and-acceptance procedures are not sufficient, and it disputes assertions that customers have not had adequate time to complete negotiations for new service packages.[31] It argues that customers have known about "fresh look" since August of 1991, leaving them plenty of time to seek competitive bids and select a new carrier or carriers.[32]

12. AT&T also opposes extending "fresh look" to 800 term plans. It argues that "fresh look" was adopted to address the possibility that, by bundling 800 service with other services, AT&T might leverage some 800 services customers to gain an advantage in other service markets. It contends that "fresh look" was not intended to apply to 800 term plans that involve no bundling.[33] AT&T argues, further, that, in the absence of a Commission finding that AT&T's 800 term plans are unlawful and that "fresh look" for 800 term plans is fair and reasonable, extending "fresh look" to AT&T's 800 service term plans would constitute an unlawful prescription under Section 205 of the Communications Act.[34] Finally, AT&T contends that any restriction on AT&T's ability to offer 800 service term plans would be anticompetitive.[35]

V. DISCUSSION

13. We now deny the Ad Hoc and Sprint petitions. We do not find any of the reasons given by the petitioners warrant an extension of the ninety-day "fresh look" period. Indeed, we have already considered and rejected related arguments in the *800 Data Base Proceeding*. Similarly, we reject Sprint's request to extend "fresh look" to 800 service term plans. We find that Sprint's request is procedurally improper, and that its arguments are unconvincing in any event.

A. Extension of Time

14. Parties seeking an extension of the "fresh look" time period generally argue that AT&T's 800 service customers will, for various reasons, be unwilling or unable to change carriers during this period. Sprint, for example, citing customer concerns over whether LECs and IXCs would accomplish all of the work necessary for a smooth implementation of the data base system, argues that many customers will adopt a "wait and see attitude" and hold off on IXC changes until they are comfortable with the 800 data base and related systems. This argument is not convincing. Commission staff have closely monitored the progress of 800 data base implementation to ensure that the necessary network-related work was complete before the system was implemented. Moreover, our monitoring efforts have included monthly meetings attended by representatives of many of the large users that are subject to the "fresh look" policy. At these meetings, these users were able to raise any concerns they might have had about 800

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[21] *See* CompTel comments at 4; CNSG comments at 3; LDDS comments at 3.

[22] MCI comments at 5-6. TRA also supports the Sprint proposal; *see* TRA comments at 2-3; while ARINC supports both proposals. *See* ARINC comments at 2 and 3. API and United/Covia support an extension of time without specifying which plan they favor.

[23] *See* CNSG comments at 3; MCI comments at 6.

[24] MCI comments at 5.

[25] TRA comments at 3; United/Covia reply at 2-6.

[26] In its petition for reconsideration of the *Report and Order*, Ad Hoc argued that 800 bundling restrictions -- including the "fresh look" provision -- were unnecessary. It argued, further, that if the Commission were to restrict AT&T's ability to bundle 800 service, the restriction should only prohibit AT&T from making bundled offerings to customers that began taking 800 service from AT&T prior to January 1, 1987. *See Reconsideration Order*, 7 FCC Rcd at 2678.

[27] Ad Hoc comments at 2-4. Sprint defends its proposal in its reply claiming that there is no relationship between the start of 800 service competition and the elimination of AT&T's market power. Sprint reply at 5-6.

[28] LDDS comments at 3-5; TRA comments at 2. TRA seems to ask the Commission to apply "fresh look" to all customers of all carriers with 800 service contracts extending beyond May 1, 1993. *Id.*

[29] AT&T comments at 15-16.

[30] *Id.* at 16-17.

[31] *Id.* at 19. AT&T also notes that competition is possible without multiple carrier routing. Customers, it argues, can use multiple carriers by using different 800 numbers for each carrier. *Id.* at 17-18.

[32] *Id.* at 20.

[33] *Id.* at 7-9.

[34] *Id.* at 6-7.

[35] *Id.* at 9-15.

data base service and the implementation process. As a result of these meetings, and the progress that was made in resolving issues relating to the implementation of 800 data base service, we do not believe that users harbor the grave concerns Sprint identifies or that these types of concerns would still be justified.

15. Equally significant, any concerns that users may have about the reliability of the data base system generally would apply to all carriers, since the data base system is used for all 800 calls. Only concerns about the specific data base systems for changing carriers could have relevance to a customer's willingness to change carriers.

16. Ad Hoc argues that customers seeking multiple carrier routing arrangements may be reluctant to change carriers without automated notice-and-acceptance procedures.[36] In the *800 Data Base Proceeding*, we rejected assertions that customers would be unwilling to use multiple carrier routing without automated notice-and-acceptance.[37] No party presents any evidence here that would cause us to change our view. In particular, no one demonstrates why manual procedures will not suffice as an interim approach. Moreover, carriers for whose benefit these manual procedures have been adopted do not assert that they are inadequate, only that some users have concerns about a manual system. Indeed, Sprint comments that it is confident that manual notice-and-acceptance procedures will work smoothly.[38] Thus, we conclude that there is no evidence that manual procedures for multiple carrier routing will not work smoothly, and we have no reason to believe that the use of manual procedures will cause a significant number of subscribers to opt not to exercise their "fresh look" rights.

17. Sprint claims, further, that "|t|here are a number of as-yet unresolved issues relating to the administration and operation of the SMS/800 database which directly affect how easy it will be for customers to subscribe to multiple 800 service providers."[39] Among the issues Sprint identifies, virtually all were resolved prior to the implementation of number portability. For example, the Commission has clarified that "area-of-service routing" is a basic feature of 800 access that should be made available at no additional charge.[40] In addition, the Common Carrier Bureau has ruled that the SMS administrator may, with customer authorization, change a customer's RESPORG.[41] Finally, as noted above, the 800 Committee has adopted manual notice-and-acceptance procedures to be used until automated systems are implemented. The only other "area of uncertainty" claimed by Sprint concerns the availability of a view-only functionality. While this functionality has been scheduled for implementation in October 1993,[42] Sprint has not demonstrated that its unavailability will affect the ability of customers to subscribe to multiple 800 service providers. Thus, we conclude that the unavailability of a view-only functionality prior to October 1993 does not warrant any change in our fresh look policy.

18. Sprint and MCI also raise the possibility that AT&T may be able to dissuade customers from exercising their "fresh look" rights by refusing to provide only part of the service for a particular 800 number. There is no evidence in the record to support this allegation. Moreover, our decision to classify area-of-service routing as a feature of basic 800 access should ensure that users will be able to split their traffic between AT&T and other carriers if they so choose. Finally, we have found that with the advent of 800 number portability, 800 services, like other business services, are now subject to substantial competition.[43] Thus, any customer eligible for "fresh look" may now take all of its 800 business to an AT&T competitor if AT&T does not offer the service the customer seeks. This ability of customers to seek out competitive alternatives should deter AT&T from taking actions that would hurt its future relationship with a customer.

19. Finally, Sprint, TRA and United/Covia ask the Commission to extend the "fresh look" period in order to allow customers adequate time to complete the carrier selection process and migrate traffic to new carriers. Customers and carriers have known about "fresh look" since the adoption of the *Report and Order* in August of 1991. Customers and carriers have also been active participants in the *Reconsideration Order* and in the *800 Data Base Proceeding*. There is thus no valid reason why customers should not have begun the process of soliciting bids and considering their various service options in time for them to exercise "fresh look" during the ninety-day period. United/Covia claims that it could suffer a substantial financial penalty for terminating its AT&T contract because migration of its traffic to a new carrier will take longer than ninety days. This is not a reason, we believe, to extend "fresh look" as United/Covia requests. It is not our intention, in setting the "fresh look" period at ninety days, to ensure that each and every customer with "fresh look" rights is able to migrate all of its traffic off AT&T's network in the allotted time. Rather, in choosing ninety-days as the time period, we have tried to allow customers who may have been improperly leveraged a reasonable time period to review their bundled service deals without unfairly penalizing AT&T.

B. Expansion to AT&T's 800 Term Plans

20. We also deny Sprint's request to expand "fresh look" to apply to customers of AT&T's 800 term plans. We note at the outset that Sprint filed its petition as a prayer for an emergency declaratory ruling, an inappropriate vehicle for Sprint to raise this issue. Section 1.2 of our Rules states that "|t|he Commission may. . . . issue a declaratory ruling terminating a controversy or removing uncertainty."[44] In adopting the 800 and inbound service bundling restrictions, we stated unequivocally that these restrictions applied only to certain of AT&T's bundled offerings. Thus, for example, we said that "until 800 number portability is available, future bundling by AT&T of any service with 800 or

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[36] As noted above, these procedures will likely be implemented in May 1994. Until that time, manual procedures adopted by the Carrier Liaison Committee 800 Data Base Committee ("the 800 Committee") will be used. LECs, IXCs, and user representatives all participated in the Committee deliberations.

[37] *Extension Order*, 7 FCC Rcd at 8620.

[38] Sprint comments at 2-3 and n.3.

[39] Sprint petition at 5.

[40] *See* Provision of Access for 800 Service, *Order*, CC Docket No. 86-10, 8 FCC Rcd 1423 (1993).

[41] *See* Provision of Access for 800 Service, *Order*, CC Docket No. 86-10, 8 FCC Rcd 1844 (Com. Car. Bur. released March 11, 1993).

[42] *See* n.13, *supra*.

[43] *Second Report*, 8 FCC Rcd 3668.

[44] 47 C.F.R. § 1.2.

inbound service using "old" 800 numbers . . . is an unlawful practice under section 201(b) of the Communications Act."[45] Sprint does not allege, and we do not find, any language in either the *Report and Order* or the *Reconsideration Order* that might lend itself to an interpretation that the 800 and inbound bundling restrictions might apply to AT&T's 800 term plans. Under the circumstances, Sprint should have pursued the relief it seeks in a petition for reconsideration of the *Report and Order* or a petition for rulemaking, not a petition for declaratory ruling.

21. We find further that Sprint's petition fails on the merits. Sprint contends that 800 term plan customers should get a "fresh look" because they are less sophisticated than other users and may have been unaware that numbers would soon be portable when they signed their long-term contracts. However, 800 term plan customers are not necessarily smaller or less sophisticated than customers with bundled packages of services. Moreover, the 800 data base proceeding has been ongoing since 1986. This proceeding has been widely covered in the trade press, and we find unconvincing arguments that term plan customers were generally unaware of the imminence of number portability.

22. In any event, Sprint's argument misconstrues the purpose of "fresh look." "Fresh look" is part of a package of remedies designed to address a specific practice -- bundling by AT&T of 800 or inbound service with other services. We found, after reviewing an extensive record on the subject, that bundling by AT&T could have a significant impact on interexchange competition by allowing AT&T to leverage its position as the major provider of 800 service in order to obtain orders for other services from its 800 service customers. So concerned were we with this practice that we prohibited future bundling by AT&T of old 800 numbers until 800 numbers became portable. To avoid undue customer disruption, however, we allowed existing bundled service arrangements to remain in effect. We adopted "fresh look" to mitigate the competitive harm caused by bundling, and, in particular, by our decision to permit existing bundled packages to remain in effect.

23. As seen in this context, "fresh look" was never intended to apply in every instance in which some carrier might have had a competitive advantage with respect to a particular customer as a result of the lack of 800 number portability. In particular, "fresh look" was never intended to apply to the bundled arrangements of carriers other than AT&T or to 800 term plans offered by AT&T or other carriers, and we do not find it appropriate to extend fresh look to these situations now.[46] No one has demonstrated that these situations present the same degree of leveraging or the same risk to competition in the interexchange marketplace as the bundled packages subject to fresh look. We also note that AT&T's competitors, unlike AT&T, have been permitted to bundle 800 and other services without limitation and that these carriers' bundled packages are not subject to fresh look.[47] Accordingly, we decline to extend this special remedy to AT&T's 800 term plans.

24. Because we find that "fresh look" does not apply to 800 term plan customers, we do not consider the argument that "fresh look" should only apply to customers with 800 numbers obtained prior to January of 1987, or that "fresh look" should apply to 800 term plan customers of other carriers.

VI. CONCLUSION

25. We now deny the petition of Ad Hoc seeking an extension of the "fresh look" period to 90 days after the implementation of an automated "notice-and-acceptance" functionality in the 800 data base. We also deny the Sprint petition seeking a 90 day extension of "fresh look" and an expansion of "fresh look" to apply to AT&T's 800 term plans. We do not find the petitioners' arguments sufficiently compelling to warrant an extension of the ninety-day "fresh look" period. Indeed, we have already considered and rejected most of these arguments in the *800 Data Base Proceeding*. Similarly, we reject Sprint's request to extend "fresh look" to 800 service term plans. We find that Sprint's request is procedurally improper, and its arguments are unconvincing.

VII. ORDERING CLAUSES

26. Accordingly, pursuant to authority contained in Sections 1, 4, and 201-205 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 201-205, and Section 1.2 of the Commission's Rules, 47 C.F.R. § 1.2, IT IS ORDERED that the petition of the Ad Hoc Telecommunications Users Committee for expedited modification of fresh look policy and Sprint Communications Company's emergency petition for declaratory ruling are DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[45] *Reconsideration Order*, 7 FCC Rcd at 2677 (modified bundling restrictions clearly indicate that they apply to AT&T alone).

[46] *See Report and Order*, 6 FCC Rcd at 5906; *March 1993 Order*.

[47] *See March 1993 Order*, *supra* n.4 (order denying AT&T petition to extend 800 bundling restriction to all interexchange carriers).

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
July 16, 1993

Released: July 26, 1993

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Southern Broadcasting Companies, Inc. 8310MGK
3360 Capital Circle NE, Suite D 93001141
Tallahassee, Florida 32308

Dear Licensee:

This letter constitutes a NOTICE OF APPARENT LIABILITY FOR A FORFEITURE pursuant to Section 503(b) of the Communications Act of 1934, as amended.

By letter of December 30, 1992, from Larry D. Eads, Chief, Audio Services Division, Mass Media Bureau, to Gary S. Smithwick, Esquire, the Commission granted an application to assign Station WSTT-AM, Thomasville, Georgia, from Southern Broadcasting Companies, Inc., to Malren Broadcasting, Inc. This grant was specifically without prejudice to whatever further action the Commission might deem appropriate in this matter.

The assignment application, when filed, was challenged by Mr. Jerry E. White, who asserted that (1) the station had been dark without authorization and/or operated at a lower than authorized level of power, (2) the station did not maintain a public file as required by Section 73.3526 of the Commission's Rules, and (3) the assignment application, as originally filed, was an attempt to transfer a "bare license" in violation of Commission Rules. The December letter resolved the third issue in Southern Broadcasting's favor, concluding that a transfer of a bare license was neither intended nor accomplished in this case. With respect to the first two issues, the letter found that the issues were neither disqualifying nor of a nature warranting deferral of action on the assignment application. It left open, as noted above, the question of other Commission action.

It would appear from the information before us, in particular the May 6, 1992, declaration of Charles E. Giddens, Vice-President of Southern Broadcasting Companies, Inc., that from the spring of 1991 until March, 1992, at least, Southern Broadcasing indeed violated Sections 73.1740(a)(4) and 73.3526 of the Commission's Rules. The former provision requires, in pertinent part, that licensees unable to continue operating for reasons beyond their control notify the Commission of this fact and seek Commission approval for discontinued operation extending beyond a 30 day period. According to Mr. Giddens, WSTT suffered extensive fire damage in 1990. Southern Broadcasting decided that immediate reconstruction would be impractical, and the company attempted instead to sell the station. While there is some suggestion in Mr. White's pleadings that the station may have continued operation, albeit at reduced power, until the spring of 1991, it is undisputed that WSTT did not notify the Commission of its silence until March 30, 1992, well beyond the 30 day period permitted by our rules.

With respect to Section 73.3526, Mr Giddens concedes that only the WSTT assignment application was in fact available to the public during the time the station was off the air. This is a clear violation of our requirement that broadcast stations maintain for public inspection a file containing copies of applications, ownership reports, programming information, and other specified information.

Accordingly, pursuant to Section 503(b) of the Communications Act, Southern Broadcasting Companies, Inc., is hereby advised of its apparent liability for a forfeiture of seventeen thousand five hundred dollars ($17,500) for its apparent violations of Sections 73.1740(a)(4) and 73.3526 of the Commission's Rules during the time period stated above. The amount specified was determined by using the criteria set forth in the *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *on recon.*, 7 FCC Rcd 5339 (1992), *pet. for review pending sub nom., USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992), and the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended. The figure reflects a ten thousand dollar ($10,000) base amount for an unauthorized discontinuance of service, and a seven thousand five hundred dollar ($7,500) base amount for a violation of the public file rules.

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty shuld not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 U.S.C. Section 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TLC PRODUCTIONS, INC. d/b/a NORTH MIAMI INTERNATIONAL TELEPORT

File No. I-T-C-93-061

Application for authority to acquire and operate satellite facilities for provision of various international services.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: July 9, 1993; **Released: July 26, 1993**

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience require the provision of international services by TLC Productions, Inc. (TLC).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-061 IS GRANTED, and TLC is authorized to:

a. establish channels of communication between appropriately licensed U.S. earth stations and INTELSAT Atlantic Ocean Region (AOR) and Pacific Ocean Region (POR) satellites for the provision of IBS and related digital video, International Television and Datanet services between the U.S. and countries listed in Comsat's tariff F.C.C. No. 103 for the space segment of IBS, International Television and Datanet services provided, however this blanket §214 authorization is without commitment as to the Commission's action on any IBS or television Title III application that TLC may file in the future;

b. lease from Comsat and operate ten 64-kbps circuits between appropriately licensed U.S. earth stations and INTELSAT AOR or POR satellites to each point listed in Appendix A for the provision of private line services not interconnected with the public switched network;

c. lease from PanAmSat and operate ten 64-kbps circuits between appropriately licensed U.S. earth stations and the PAS-1 satellite to each point listed in Appendix B for the provision of private line services not interconnected with the public switched network;

d. lease from PanAmSat and operate one 240-kbps circuit via the PAS-1 satellite for the provision of digital voice and data services between the U.S. and Panama for the U.S. Government;

e. establish channels of communication between appropriately licensed U.S. earth stations and the satellites listed in Appendix C for the provision of transborder service[1] between the U.S. and the points listed in Appendix C; and

f. lease and operate facilities in the appropriately licensed U.S. earth stations and any necessary domestic connecting facilities.[2]

3. IT IS FURTHER ORDERED that our authorization of TLC to provide private lines is limited to the provision of such private lines only between the United States and those countries listed in Appendices or Comsat's tariffs -- that is, private lines which originate in the United States and terminate in those countries listed in the Appendices or Comsat's tariffs or which originate in those countries listed in Appendices or Comsat's tariffs and terminate in the United States. In addition, TLC may not -- and TLC's tariff must state that TLC's customers may not -- connect private lines provided over these facilities to the public switched network either at the U.S. end or at any country end listed in the Appendices or Comsat's tariffs, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that those countries listed in the Appendices or Comsat's tariffs afford resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending.*

4. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreement it enters into with its foreign correspondents with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

5. IT IS FURTHER ORDERED that neither TLC nor any persons or companies "directly or indirectly controlling or controlled by TLC, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which TLC or any persons or companies controlling or controlled by TLC are parties.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

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[1] *See* Transborder Services listed in the Commission's June 1, 1993 Public Notice, Report No. IS-0035, at Attachment 2.

[2] Should TLC wish to provide the subject services via its own earth stations, appropriate authorization under Title III of the Communications Act of 1934, as amended, will be required.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file the circuit addition reports required by Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b) for any additional circuits acquired on the INTELSAT Satellite System.

9. IT IS FURTHER ORDERED that the applicant shall file an application pursuant to Section 214 of the Communications Act, 47 U.S.C. §214, before adding any circuits or channel of communications for the provision of service over the PAS-1 satellite system.

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities
Division
Common Carrier Bureau

APPENDIX A

COUNTRIES TO BE SERVED VIA INTELSAT SATELLITES

Argentina
Austria
Bahamas
Belgium
Brazil
Chile
Colombia
Costa Rica
Denmark
Dominican Republic
Ecuador
El Salvador
France
Germany
Greece
Guatemala
Haiti
Honduras
Ireland
Israel
Italy
Jamaica
Netherlands
Nicaragua
Norway
Panama
Peru
Poland
Portugal
Spain
Sweden
Switzerland
Trinidad
United Kingdom
Venezuela
Yugoslavia

APPENDIX B

COUNTRIES TO BE SERVED VIA PAS-1

Ku-band Countries:

Albania
Anguilla
Armenia
Austria
Azerbaijan
Bahamas
Belarus
Belgium
Bermuda
Bulgaria
British Virgin Island
Cayman Islands
Czechoslovakia
Denmark
Estonia
France
Georgia
Germany
Greece
Hungary
Ireland
Italy
Kazakhstan
Kyrgyzstan
Latvia
Lithuania
Luxembourg
Moldova
Monaco
Montserrat
Netherlands
Poland
Portugal
Romania
Russian Fed.
Spain
Sweden
Switzerland
Tajikistan
Turkmenistan
Turks & Caicos Island
Ukraine
United Kingdom
Uzbekistan
Yugoslavia

C-band Countries

Anguilla
Antigua
Argentina
Aruba
Bahamas
Barbados
Barbuda
Belize
Bermuda
Bolivia
Brazil
British Virgin Islands
Cayman Islands
Chile
Colombia
Costa Rica
Dominica
Dominican Rep.
Ecuador
Grenada
Guatemala
Guyana
Haiti
Honduras
Jamaica
Mexico
Montserrat
Netherlands Antilles
Panama
Paraguay
Peru
St. Christopher and Nevis
St. Lucia
St. Vincent and the Grenadines
Suriname
Trinidad and Tobago
Turks & Caicos Island
Uruguay
Venezuela

APPENDIX C

Country	Satellite
Anguilla	Domestic
Antigua and Barbuda	Domestic
Bahamas	Domestic
Barbados	Domestic
Belize	Domestic
Bermuda	Domestic
British Virgin Islands	Domestic
Canada	Domestic, Anik
Cayman Islands	Domestic
Dominica	Domestic
Grenada	Domestic
Grenadines	Domestic
Mexico	Morelos
Montserrat	Domestic
Netherland Antilles	Domestic
St. Christopher-Nevis	Domestic
St. Lucia	Domestic
Turks & Caicos	Domestic
Venezuela	Domestic

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-29

In the Matter of

Amendment of Section 73.202(b), RM-8157
Table of Allotments,
FM Broadcast Stations.
(Temple, Texas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 9, 1993; Released: July 27, 1993

By the Chief, Allocations Branch:

1. At the request of Progressive Communications, Inc. ("petitioner"), permittee of Channel 269A, Temple, Texas, the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 2750 (1993) ("*Notice*"), proposing the substitution of Channel 269C3 for Channel 269A at Temple, and modification of petitioner's authorization to specify operation on the higher powered channel. Petitioner filed comments stating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 269C3 for Channel 269A at Temple, since it could provide the community with an additional wide coverage area FM service. Channel 269C3 can be allotted to Temple in compliance with the Commission's minimum distance separation requirements with a site restriction of 20.1 kilometers (12.5 miles) northwest to avoid a short-spacing to vacant but applied for Channel 270A, Lometa, Texas.[1] However, the issuance of a license for Channel 269C3 may be withheld until Station KOKE-FM, Channel 269A, Giddings, Texas, is licensed on Channel 268C2 at the site specified in its construction permit.[2] As requested, we will also modify petitioner's authorization to specify operation on Channel 269C3 in accordance with the provisions of Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 10, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Temple, Texas	269C3, 282C2

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Progressive Communications, Inc. for its station at Temple, Texas, IS MODIFIED to specify operation on Channel 269C3, in lieu of Channel 269A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Progressive Communications, Inc., permittee of a FM station, Channel 269C3, Temple, Texas, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

6. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to Radio Lee County, P.O. Box 387, Giddings, Texas 78942 (licensee of Station KOKE-FM).

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 269C3 at Temple are North Latitude 31-16-24 and West Longitude 97-23-33.

[2] As stated in the *Notice*, Station KOKE-FM was modified from Channel 269A to Channel 268C2 in MM Docket No. 86-328. *See* 2 FCC Rcd 1940 (1987). Accordingly, Station KOKE-FM is no longer entitled to protection for its former Channel 269A at Giddings. *See Plainview, Texas*, 4 FCC Rcd 8788 (1989). We will serve the licensee of Station KOKE-FM with a copy of this *Report and Order*.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-27

In the Matter of

Amendment of Section 73.202(b), RM-8178
Table of Allotments,
FM Broadcast Stations.
(Bentonville, Arkansas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 9, 1993; Released: July 27, 1993

By the Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 8 FCC Rcd 1372 (1993), issued in response to a petition filed by JEM Broadcasting Company, Incorporated ("petitioner") proposing the allotment of Channel 239A to Bentonville, Arkansas, as that community's second local FM service. Petitioner filed comments in support of the proposal.[1] No other comments were received.

2. We believe the public interest would be served by allotting Channel 239A to Bentonville since it could provide a second local FM service to the community. Channel 239A can be allotted to Bentonville consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules, provided the transmitter is located at least 4 kilometers (2.5 miles) southwest of the community[2] to avoid a short-spacing to Station KKBL(FM), Channel 240A, Monett, Missouri.[3]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 10, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to Bentonville, Arkansas, as follows:

City	Channel No.
Bentonville, Arkansas	239A, 252C2[4]

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. The window period for filing applications for Channel 239A at Bentonville, Arkansas, will open on **September 11, 1993,** and close on **October 12, 1993.**

6. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] As stated in the *Notice* and reiterated in its comments, petitioner states that as the licensee of daytime only Station KJEM(AM), Bentonville-Bella Vista, Arkansas, it intends to exercise its enhancement credit for Channel 239A at the application level if this proposal is adopted.

[2] Coordinates used for Channel 239A at Bentonville are 36-20-09 and 94-13-36.

[3] Coordinates at the licensed site of Station KKBL(FM) are 36-56-15 and 93-55-30.

[4] Channel 252C2 was substituted for Channel 252C3 at Bentonville in MM Docket No. 92-176 by *Report and Order* adopted July 9, 1993.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-34

In the Matter of

Amendment of Section 73.202(b),	RM-8100
Table of Allotments,	
FM Broadcast Stations.	
(Glenwood Springs, Colorado)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 9, 1993; **Released: July 27, 1993**

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 8 FCC Rcd 1546 (1993), issued in response to a petition for rule making filed on behalf of Gardiner Broadcast Partners, Ltd. ("petitioner") proposing the allotment of FM Channel 224A to Glenwood Springs, Colorado, as that community's second local FM service. Petitioner filed comments reiterating its intention to apply for Channel 224A, if it is allotted to Glenwood Springs, as requested.

2. We believe the public interest would be served by allotting Channel 224A to Glenwood Springs since it could provide a second local FM service to the community. Channel 224A can be allotted to Glenwood Springs consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules[1] without a site restriction.[2]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 10, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Glenwood Springs, Colorado	224A, 256C3

4. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send a copy of this *Order* by Certified Mail, Return Receipt Requested, to Colorado West Broadcasting, Inc., Radio Station KMTS(FM), 1322-1/2 Grand Avenue, Glenwood Springs, Colorado 81601.

5. The window period for filing applications on Channel 224A at Glenwood Springs, Colorado, will open on **September 11, 1993,** and close on **October 12, 1993**.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Coordinates used for Channel 224A at Glenwood Springs are 39-32-36 and 107-19-18.

[2] As stated in the *Notice*, we recognize that the requested allotment of Channel 224A at Glenwood Springs conflicts with the presently licensed operation of Station KMTS(FM) on Channel 224A at that community. However, Station KMTS(FM) was modified to specify operation on Channel 256C2 and subsequently downgraded to Channel 256C3, for which a construction permit has been issued at coordinates 39-31-58 and 107-20-30 (File No. BPH-930202IH). *See Memorandum Opinion and Order*, 3 FCC Rcd 5560 (1988). Therefore, Station KMTS(FM) is no longer entitled to protection for its former Channel 224A at Glenwood Springs. *See Plainview, Texas*, 4 FCC Rcd 8788 (1989). Additionally, since the construction permit for Station KMTS(FM) is not in conflict with the instant proposal, we believe that public interest considerations dictate resolving this proceeding in order to provide a second local FM service to the residents of Glenwood Springs. As a result of our determination, we will serve a copy of this *Order* on Colorado West Broadcasting, Inc., licensee of Station KMTS(FM).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-92

In the Matter of

Amendment of Section 73.202(b), RM-8205
Table of Allotments,
FM Broadcast Stations.
(Howe, Texas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 9, 1993; Released: July 27, 1993

By the Chief, Allocations Branch:

1. At the request of Maple Communications Limited Partnership ("petitioner"), permittee of Station KHYI-FM, Channel 237A, Howe, Texas, the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 2750 (1993), proposing the substitution of Channel 237C3 for Channel 237A at Howe, and modification of Station KHYI-FM's construction permit to specify the higher powered channel. Petitioner filed comments stating its intention to apply for Channel 237C3, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 237C3 for Channel 237A at Howe, since it could provide the community with a wide coverage area FM service. Channel 237C3 can be allotted to Howe in compliance with the Commission's minimum distance separation requirements with a site restriction of 12.0 kilometers (7.5 miles) south to accommodate petitioner's desired site.[1] As proposed, we will also modify Station KHYI-FM's construction permit to specify operation on Channel 237C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 10, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Howe, Texas	237C3

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Maple Communications Limited Partnership for Station KHYI-FM, Howe, Texas, IS MODIFIED to specify operation on Channel 237C3, in lieu of Channel 237A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and /or upgrade. As a result of this proceeding, Maple Communications Limited Partnership, permittee of Station KHYI-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 237C3 at Howe are North Latitude 33-23-58 and West Longitude 96-35-51.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-176

In the Matter of

Amendment of Section 73.202(b),	RM-8038
Table of Allotments,	RM-8116
FM Broadcast Stations.	
(Bentonville, Mountain Home and Yellville, Arkansas)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 9, 1993; Released: July 27, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making and Order to Show Cause*, 7 FCC Rcd 5443 (1992), issued in response to a petition for rule making filed by Demaree Media, Inc. ("DMI"), licensee of Station KOLZ(FM), Bentonville, Arkansas, proposing the substitution of Channel 252C2 for Channel 252C3,[2] and modification of its license accordingly. To accommodate its proposal, DMI also requested the substitution of Channel 232A for Channel 252A at Mountain Home, Arkansas, and modification of the license of Mountain Home Broadcasting Corporation ("MHBC") for Station KTLO-FM. DMI filed supporting comments in response to the Notice.[3] In response to the *Order to Show Cause*, comments and a counterproposal were filed jointly by MHBC, A&J Broadcasting Company ("A&J"),[4] and Twin Cities Broadcasting, Inc. ("Twin Cities").[5] [6] DMI filed reply comments. MHBC, A&J and Twin Cities submitted late-filed reply comments, to which DMI responded.[7] Additional comments were filed by DMI and MHBC.[8]

2. In support of its proposal DMI states that Bentonville's population has increased significantly during the past decade. Further, DMI states that other than its Station KOLZ(FM), Bentonville is served locally by daytime only Station KJEM(AM).[9] Thus, DMI urges that adoption of its proposal would enable it to provide Bentonville with an expanded coverage area FM service.[10]

3. In response to the *Order to Show Cause*, MHBC submitted a joint counterproposal setting forth several options to accomplish a channel upgrade for its Station KTLO-FM, Channel 252A, to specify operation on Channel 250C2 at Mountain Home, by utilizing a restricted site located 22 kilometers (13.7 miles) southeast of the community. MHBC contends that the restricted site will enable Station KTLO-FM to be upgraded while remaining fully spaced to the proposed operation of Station KOLZ(FM) on Channel 252C2 at Bentonville.[11] Additionally, in order to accommodate its proposal, MHBC requests the substitution of Channel 269A for Channel 249C2 at Yellville, Arkansas, and modification of the license of A&J for Station KCTT-FM accordingly. MHBC states that Channel 269A can be allotted to Yellville at the licensed site of Station KCTT-FM,[12] and provided an agreement with A&J consenting to the modification of its facilities.[13] [14]

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[1] The community of Yellville, Arkansas, has been added to the caption.

[2] Petitioner is presently licensed on Channel 252A. However, it was modified to specify operation on Channel 252C3 in MM Docket No. 91-124. *See* 6 FCC Rcd 6498 (1991). Petitioner has filed an application for a construction permit to operate on Channel 252C3 at Bentonville. *See* File No. BPH-920518IA.

[3] As stated in the *Notice*, although petitioner's request was signed and its address given, it did not verify the statements contained in the petition as required by Section 1.52 of the Commission's Rules. Petitioner was requested to correct the noted deficiency in its responsive comments, and has complied accordingly.

[4] A&J is the licensee of Station KCTT-FM, Yellville, Arkansas.

[5] Twin Cities is the licensee of Station KOZX(FM), Cabool, Missouri.

[6] Public Notice of the counterproposal was given on November 6, 1992, Report No. 1916 (RM-8116).

[7] MHBC states that these comments, which were accompanied by a motion to accept, are intended to clarify a misunderstanding between MHBC and petitioner regarding the intent of MHBC's jointly filed comments and counterproposal in this proceeding. The Commission's Rules do not contemplate the filing of pleadings beyond the comment periods set forth in the *Notice*. Moreover, in light of our determination regarding MHBC's counterproposal, as discussed *infra*, we find that the additional comments do not provide information of decisional significance, and therefore they will not be considered.

[8] The joint comments seek approval of the channel allotments requested herein on an expedited basis. In light of our action herein, this pleading is moot.

[9] However, Channel 239A has been proposed as a second local FM service to Bentonville. *See Notice of Proposed Rule Making*, 8 FCC Rcd 1372 (1993), in MM Docket No. 93-27.

[10] DMI also advises that if its proposal is adopted, it will create an overlap of the 70 dBu contour of its commonly-owned Station KKEG(FM) at Fayetteville, Arkanas. However, DMI states that it will comply with the multiple ownership requirements of the Commission's Rules at the application level. *See* 47 C.F.R. § 73.3555.

[11] The distance between proposed Channel 252C2 at Bentonville and the licensed site for Station KTLO-FM, Channel 252A, Mountain Home, Arkansas, at coordinates 36-20-55 and 92-23-59 is 145 kilometers (90 miles) whereas a distance of 166 kilometers (103 miles) is required between Class A and C2 co-channels. However, the distance between MHBC's counterproposal to modify Station KTLO-FM to Channel 250C2 and to relocate its transmitter at coordinates 36-10-00 and 92-15-00 is 157.5 kilometers (104 miles) whereas a distance of only 58 kilometers (36 miles) is required in this instance. While there is no technical conflict between MHBC's upgrade request at Mountain Home and the petitioner's proposal at Bentonville, the two are interrelated since Channel 252A at Mountain Home must be deleted to accommodate each upgrade request.

[12] Coordinates at the licensed site of Station KCTT-FM are 36-15-39 and 92-41-41.

[13] In further support of the Yellville modification, petitioner advises that Station KCTT-FM was modified to specify operation on Channel 249C2 at a restricted site located 28.3 kilometers west of the community, in the context of MM Docket No. 87-565. *See* 3 FCC Rcd 5813 (1988). However, it states, the former licensee did not pursue the modification before

4. In its reply comments, DMI interposes no objection to the requested realignment of channels contained in MHBC's counterproposal since the requested changes sought by MHBC would not have an impact on its proposal.[15]

5. In view of the above, we believe the public interest would be served by substituting Channel 252C2 for Channel 252C3 at Bentonville and substituting Channel 250C2 for Channel 252A at Mountain Home since it would enable both communities to receive an expanded coverage FM service. Additionally, since A&J has agreed to the downgrade in the facilities of Station KCTT-FM, we will substitute Channel 269A for Channel 249C2 at Yellville, to accommodate MHBC's proposal. As stated in the *Notice*, Channel 252C2 can be allotted to Bentonville at DMI's suggested site, located 28 kilometers (17.4 miles) southeast of the community.[16] Channel 250C2 can be allotted to Mountain Home at MHBC's suggested site, located 22.3 kilometers (13.8 miles) southeast of the community.[17] Channel 269A can be allotted to Yellville at the licensed site of Station KCTT-FM.[18]

6. In accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying herein the license of Demaree Media, Inc. for Station KOLZ(FM) to specify operation on Channel 252C2 at Bentonville, and the license of Mountain Home Broadcasting Corporation for Station KTLO-FM to specify operation on Channel 250C2 in lieu of Channel 252A at Mountain Home, Arkansas. Additionally, we are modifying the license of A&J Broadcasting Company for Station KCTT-FM, Yellville, Arkansas, to specify operation on Channel 269A.

7. Pursuant to DMI's representation regarding its commonly-owned Station KKEG(FM) at Fayetteville, Arkansas, it is expected to submit an application specifying facilities for Station KOLZ(FM) that will comply with the multiple ownership requirements of § 73.3555 of the Commission's Rules.

8. Although DMI and MHBC may both be accommodated in the context of this proceeding, DMI recognizes that MHBC must change the frequency for Station KTLO-FM to accommodate its upgrade request. The *Notice* proposed to substitute nonadjacent Channel 232A for Channel 252A at Mountain Home and modify the license for Station KTLO-FM accordingly. MHBC has requested the modification of its frequency to Channel 250C2 instead of the substitution of Channel 232A which would not allow an upgrade for Station KTLO-FM. As DMI benefits from the change in frequency at Mountain Home, and has stated its willingness to reimburse MHBC, we shall order DMI to reimburse MHBC for the reasonable costs in changing its frequency equivalent to the costs of changing to a Class A channel. *See Mitchell, South Dakota*, 30 RR 2d 1688 (1976); *see also Lonoke, Arkansas and Clarksdale, Mississippi*, 6 FCC Rcd 4861 (1991).

9. Additionally, MHBC is required to reimburse A&J for the reasonable costs associated with the modification of the facilities for Station KCTT-FM, Yellville, Arkansas. *See Circleville and Columbus, Ohio*, 8 FCC 2d 159 (1967). MHBC has stated its willingness to reimburse A&J.

10. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 10, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

City	Channel No.
Bentonville, Arkansas	252C2
Mountain Home, Arkansas	250C2, 288C2, 298C1
Yellville, Arkansas	269A

11. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the licenses of Demaree Media, Inc. for Station KOLZ(FM), Bentonville, Arkansas, Mountain Home Broadcasting Corporation for Station KTLO-FM, Mountain Home, Arkansas, and A&J Broadcasting Company for Station KCTT-FM, Yellville, Arkansas, ARE MODIFIED to specify operation on Channel 252C2, Channel 250C2 and Channel 269A, respectively, subject to the following conditions:

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assigning Station KCTT-FM to A&J. Although A&J has received a construction permit for Channel 249C2, MHBC advises that it has reached an agreement with A&J whereby it will compensate that licensee to accept the modification of the facilities for Station KCTT-FM to specify operation on Channel 269A at Yellville. Moreover, MHBC asserts that since Channel 269A can be allotted at the licensed site of Station KCTT-FM, A&J believes it could operate Station KCTT-FM more economically as a Class A facility, and that a lower-powered channel would be adequate to serve that small community (population 1,181, according to the 1990 U.S. Census).

[14] Additionally, MHBC alternately requests the substitution of Channel 271A for Channel 251A at Cabool, Missouri, and modification of the license of Twin Cities for Station KOZX(FM), to which Twin Cities has agreed. MHBC states that while the Cabool substitution is not required to accommodate its upgrade request, provided it relocates Station KTLO-FM to a site 22 kilometers (13.6 miles) southeast of the community, it would alternately enable MHBC to employ a directional antenna near its presently licensed site. Therefore, MHBC urges that in the event the petition for reconsideration in MM Docket No. 89-120 is denied or dismissed before this proceeding is resolved, that Channel 250C2 be allotted to Mountain Home at a site at coordinates 36-20-25 and 92-23-59, which it states is near the present KTLO-FM antenna site. However, as our policy is to decline the acceptance of proposals to change the Table of Allotments that are dependent upon final action in another proceeding, we cannot consider the Cabool substitution at this time. *See Oxford and New Albany, Mississippi*, 3 FCC Rcd 615 (1988). As a result of our determination, responsive comments related to the Cabool, Missouri, substitution will not be considered.

[15] While interposing no objection to an upgrade for Station KTLO-FM, DMI nevertheless believes MHBC's counterproposal is not acceptable for consideration to the extent it is dependent upon the outcome of MM Docket No. 89-120, citing *Amendment of §1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911 (1990). However, DMI's objection is moot in light of our determination discussed in footnote 14 above.

[16] Coordinates used for Channel 252C2 at Bentonville are 36-11-00 and 94-00-00.

[17] Coordinates used for Channel 250C2 at Mountain Home are 36-10-00 and 92-15-00.

[18] Coordinates used for Channel 269A at Yellville are 36-15-39 and 92-41-41.

(a) Within 90 days of the effective date of this *Order*, the licensees shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

12. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Demaree Media, Inc., licensee of Station KOLZ(FM), Bentonville, Arkansas, and Mountain Home Broadcasting Corporation, licensee of Station KTLO-FM, Mountain Home, Arkansas, are required to submit a rule making fee in addition to the fee required for the applications to effectuate their upgrades.

13. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the licensees of Station KTLO-FM, Station KCTT-FM and Station KOZX(FM), as follows:

Mountain Home Broadcasting Corporation
Radio Station KTLO-FM
P.O. Box C
Mountain Home, Arkansas 72653

A&J Broadcasting Company
Radio Station KCTT-FM
P.O. Box 100
Yellville, Arkansas 72687

Twin Cities Broadcasting, Inc.
Radio Station KOZX(FM)
P.O. Box 514
Cabool, Missouri 65689

14. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

15. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NYNEX Telephone Companies — Transmittal Nos. 180, 211

Revisions to
Tariff F.C.C. No. 1

ORDER

Adopted: July 15, 1993; **Released: July 16, 1993**

By the Associate Bureau Chief, Common Carrier Bureau:

1. On April 13, 1993, NYNEX Telephone Companies (NYNEX) filed Transmittal No. 180 to expand NYNEX Enterprise Service (NES or Enterprise) to include Fractional DS1 service.[1] NYNEX also proposes to offer several optional features with its Fractional DS1,[2] to revise the costs and rates of its current Enterprise DS0 offering,[3] and to add three new interfaces and two optional features to the DS0 service.

2. MFS Communications Company, Inc. (MFS) and the Independent Data Communications Manufacturers Association, Inc. (IDCMA) both filed petitions on April 28, 1993, to reject or, alternatively, to suspend and investigate Transmittal 180.[4] MFS argues that because the proposed optional features are functionally equivalent to currently tariffed services, Transmittal 180 contains discriminatory rates. MFS Petition at 3-4. It also asserts that Transmittal 180 is unsupported by cost data. *Id.* at 4-6. Finally, MFS maintains that the proposed service appears to violate the Commission's prohibition against bundling customer premises equipment. *Id.* at 7.

3. IDCMA argues that Transmittal 180 involves bundling of customer premises equipment, in violation of Section 64.702(e) of the Commission's rules, 47 C.F.R. § 64.702(e). IDCMA Petition at 1-2. It contends that NYNEX should not be permitted to rely on the *Enterprise Waiver Order* for deployment of customer premises multiplexers under Transmittal 180 because that decision granted a waiver limited to Enterprise DS0 service. *Id.* at 2.

4. NYNEX filed a reply on May 5, 1993.[5] NYNEX argues that Enterprise services are not "like" currently tariffed services because they have significantly different operating characteristics which provide customers with improved service provisioning and a variety of optional features. NYNEX Reply at 10. It also maintains that the costs of the services offered under Transmittal 180 are fully recovered. *Id.* NYNEX contends that the *Enterprise Waiver Order* permits deployment of customer premises multiplexers to enable provision of Fractional DS1 service. *Id.* at 3-5.

5. On July 13, 1993, NYNEX filed Transmittal No. 211 to revise Transmittal No. 180 to specify that network equipment which enables the provision of NYNEX Enterprise Fractional DS1 service will not be located on customer premises.

6. The Common Carrier Bureau has reviewed NYNEX Transmittal Nos. 180 and 211, and all related submissions. We conclude that no compelling argument has been presented that the tariff is patently unlawful as to warrant rejection, and that an investigation is not warranted at this time.

7. Accordingly, IT IS ORDERED that the petitions to reject or, alternatively, to suspend and investigate NYNEX Telephone Companies, Tariff F.C.C. No. 1, Transmittal No. 180, filed by MFS Communications Company, Inc. and Independent Data Communications Manufacturers Association, Inc. ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Jill Ross Meltzer
Associate Bureau Chief
Common Carrier Bureau

[1] Fractional DS1 service enables a customer to purchase a fraction of a DS1 bandwidth. Description and Justification at 3.

[2] These optional features include Demand Reconfiguration, Scheduled Reconfiguration, Bandwidth on Demand, Emergency Planning, and Dual Homing. Description and Justification at 4.

[3] *See* NYNEX Telephone Companies, Tariff F.C.C. No. 1, Transmittal No. 127, Order, 8 FCC Rcd 693 (Com. Car. Bur. 1993)(*Enterprise Waiver Order*), *review pending.*

[4] IDCMA also filed a letter with the Commission concerning Transmittal 180. *See* Letter from H.E. Marks to Kathleen B. Levitz, Acting Chief, Common Carrier Bureau (dated May 19, 1993.)

[5] NYNEX filed an Erratum to its Reply on May 6, 1993.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Tariff F.C.C. No. 1 — Transmittal Nos. 5245, 5271 and 5431

ORDER

Adopted: July 15, 1993; Released: July 15, 1993

By the Chief, Tariff Division, Common Carrier Bureau:

1. On June 3, 1993, AT&T Communications (AT&T) filed the captioned tariff revisions on 14 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing introduces an AT&T Software Defined Network (SDN) Service Billing Guarantee and a new promotional offering for SDN Service.[2]

2. On June 9, 1993, MCI Telecommunications Corporation (MCI) filed a petition to reject or suspend and investigate Transmittal No. 5245. AT&T replied on June 14, 1993.

3. The Common Carrier Bureau has reviewed AT&T Communications Transmittal No. 5245, as modified, and all associated pleadings. We conclude that the filing, as revised, does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petition to suspend and investigate AT&T Communications Tariff F.C.C. No. 1, Transmittal No. 5245, filed by MCI Telecommunications Corporation IS DENIED.

5. IT IS FURTHER ORDERED that the petition for waiver of Section 61.58 of the Commission's Rules, 47 C.F.R. § 61.58, to advance the effective date of material filed within Transmittal Nos. 5245, 5271, and 5431 to an effective date which will be filed on not less than one day's notice, as requested by AT&T Communications in Application No. 1661, IS GRANTED. For this purpose, Special Permission No. 93-609 is assigned.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

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[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further recon.*, Memorandum Opinion and Order, 7 FCC Rcd 2677 (1992).

[2] AT&T subsequently filed Transmittal No. 5271 to clarify language relating to the SDN Billing Guarantee. The Bureau deferred those revisions to August 2, 1993. On July 8, 1993, AT&T filed further revisions to the SDN Billing Guarantee, omitting some language contained in the original transmittal. Application No. 1661 for Special Permission for Waiver of Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59 (filed July 8, 1993); AT&T Communications Tariff F.C.C. No. 1, Transmittal No. 5431 (filed Jul. 12, 1993).

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: July 16, 1993

T.P.C., INC. AND LYNCH CORPORATION REQUEST WAIVERS OF SECTION 61.41 OF COMMISSION'S RULES

Pleading Cycle Established

COMMENTS: July 30, 1993
REPLY COMMENTS: August 13, 1993

On June 21, 1993, T.P.C., Inc. (T.P.C.) and Lynch Corporation (Lynch) each filed petitions for waivers of Sections 61.41 of the Commission's Rules, 47 C.F.R. § 61.41.

T.P.C. requests waiver of Sections 61.41(d) and 69.3(e)(11) and 69.3(i)(4) to facilitate its acquisition of the outstanding stock of Contel of North Dakota. T.P.C. states that Contel of North Dakota will operate separately from United Telephone Mutual Aid Cooperative, Dakota Central Telecommunications Cooperative and Polar Communications Mutual Aid Corporation, the three stockholders of T.P.C.

T.P.C. states that grant of the requested waivers will allow Contel of North Dakota to be subject to rate-of-return regulation; to concur in the National Exchange Carrier Association's (NECA) Tariff F.C.C. No. 5; and to participate in the NECA common line and traffic sensitive pools as a cost company. T.P.C. asserts that grant of the waivers is in the public interest because the acquisition will result in management efficiencies and customer benefits.

Lynch requests waiver of Section 61.41(c) of the rules to allow it, through Lynch VI, to acquire J.B.N. Telephone Company (JBN) in Wetmore, Kansas, and thereafter to operate JBN and Lynch's other local exchange carriers under rate of return regulation so that it too may participate in the NECA tariffs and pools.

Interested parties may file comments on these petitions for waivers no later than July 30, 1993. Replies should be filed by August 13, 1993.

An original and four copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 C.F.R. § 1.51(c). In addition, one copy of each pleading must be filed with International Transcription Services (ITS), the Commission's duplicating contractor, at its office at 2100 M Street, N.W., Suite 140, Washington, D.C. 20037 and one copy with the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

For further information, contact Wanda M. Harris or Andrew Mulitz, Tariff Division, Common Carrier Bureau, (202) 632-6917.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Transmittal No. 5366
Tariff F.C.C. No. 11

ORDER

Adopted: July 19, 1993; Released: July 19, 1993

By the Chief, Tariff Division, Common Carrier Bureau:

1. On June 28, 1993, AT&T Communications (AT&T) filed the captioned tariff revisions on 14 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing restructures rate schedules for Type 1 Digital Data Local Channel Services, modifies existing Accunet Generic Digital Access Service (AGDAS) individual case basis rates, and increases the monthly rate for Voice Grade Local Channel service, AGDAS, Accunet Digital Data Over Voice Services, and Accunet Flexible Digital Access Service Access Coordination Function charges.[2]

2. On July 6, 1993, Aeronautical Radio, INC. (ARINC) filed a petition to reject or suspend and investigate Transmittal No. 5366. AT&T replied on July 9, 1993.

3. The Common Carrier Bureau has reviewed AT&T Communications Transmittal No. 5366 and all associated pleadings. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to require rejection, and that no question has been presented that warrants investigation at this time.

4. Accordingly, IT IS ORDERED that the petition to suspend and investigate AT&T Communications Tariff F.C.C. No. 11, Transmittal No. 5366, filed by Aeronautical Radio, Inc. IS DENIED.

5. IT IS FURTHER ORDERED that waiver of Section 61.58 of the Commission's Rules, 47 C.F.R. § 61.58, to advance the effective date of material filed within Transmittal No. 5366 to an effective date which will be filed on not less than one day's notice, IS GRANTED. For this purpose, Special Permission No. 93-614 is assigned.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further recon.*, Memorandum Opinion and Order, 7 FCC Rcd 2677 (1992).

[2] The Bureau deferred the effective date of Transmittal 5366 to July 26, 1993. We now grant special permission to advance the effective date of the transmittal on less than statutory notice.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: July 16, 1993

Pacific Bell Files Petition for Expedited Waiver of the Virtual Collocation Tariffing Requirement Concerning Intrastate Arrangements (CC Docket Nos. 91-141 and 93-162)

Pleading Cycle Established

COMMENTS DUE: August 16, 1993
REPLIES DUE: August 31, 1993

On July 2, 1993, Pacific Bell filed a petition for expedited waiver of the virtual collocation tariffing requirement concerning intrastate arrangements. *See* Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, 7 FCC Rcd 7369 (1992); Ameritech Operating Companies, Transmittal Nos. 697 *et al.*, CC Docket No. 93-162, DA 93-657, released June 9, 1993. Pacific seeks to waive the requirement that it tariff its intrastate virtual collocation arrangement on an interstate basis and make it available throughout its study area to the same extent as its physical collocation tariff no later than July 16, 1993. Pacific has requested, and has been granted, special permission to postpone filing its virtual collocation tariff pending action on its waiver request.

Interested parties filing comments or oppositions to Pacific's petition are invited to do so no later than **August 16, 1993**. Parties filing replies may do so no later than **August 31, 1993**.

An original and seven copies of all pleadings shall be filed with the Secretary of the Commission. In addition, one copy shall be delivered to the Commission's commercial copying firm, International Transcription Service, Suite 140, 2100 M Street, N.W., Washington, D.C. 20037. Also, one copy shall be delivered to the Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

Copies of Pacific Bell's petition and other related documents may be obtained from International Transcription Service. The documents are also available for public inspection and copying in Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

For further information contact Norma Bell, Tariff Division, Common Carrier Bureau at (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-218

In the Matter of

Amendment of Section 76.51 of the Commission's Rules to Include Clearwater, Florida, in the Tampa-St. Petersburg, Florida, Television Market — RM-4895

MEMORANDUM OPINION AND ORDER AND NOTICE OF PROPOSED RULE MAKING

Adopted: July 16, 1993; Released: July 29, 1993

Comment Date: August 27, 1993
Reply Comment Date: September 13, 1993

By the Chief, Mass Media Bureau:

1. Before the Commission is a petition for rule making filed January 24, 1985, by Christian Television Corporation, Inc. ("CTC"), licensee of television station WCLF(TV), Channel 22 (Independent), Clearwater, Florida. CTC seeks to amend Section 76.51 of the Commission's Rules, 47 C.F.R. §76.51, to change the designation of the Tampa-St. Petersburg, Florida, television market to "Tampa-St. Petersburg-Clearwater, Florida."[1]

2. On September 25, 1985, the Commission dismissed as moot a number of petitions and requests, including CTC's, involving mandatory carriage issues following the United States Court of Appeals decision in *Quincy Cable TV, Inc. v. FCC* [2] and the Commission's subsequent determination to set aside the cable "must-carry" rules.[3] On October 10, 1985, CTC filed a petition for reconsideration of the dismissal of its rulemaking petition. CTC therein alleged that while the initial rulemaking petition did contain must-carry related arguments, it was primarily directed to redesignating the subject market to equalize competition and copyright liabilities affecting all market-area stations. CTC further stated that invalidation of the must-carry rules did not change its objective to place WCLF on an equal competitive footing with other area stations by seeking the proposed market redesignation.

3. In light of the Commission's recent actions implementing the provisions of Section 4 of the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act"),[4] discussed in detail below, we will grant CTC's petition for reconsideration and consider its rulemaking request.

BACKGROUND

4. Section 76.51 of the Commission's Rules enumerates the top 100 television markets and the designated communities within those markets. Among other things, this market list is used to determine territorial exclusivity rights under Section 73.658(m) and helps define the scope of compulsory copyright license liability for cable operators. *See* 47 CFR §76.658(m) and 17 U.S.C. §111(f). Some of the markets consist of more than one named community (a "hyphenated market"). Such "hyphenation" of a market is based on the premise that stations licensed to any of the named communities in the hyphenated market do, in fact, compete with all stations licensed to such communities. *See CATV-Non Network Agreements*, 46 FCC 2d 892, 898 (1974). Market hyphenation "helps equalize competition" where portions of the market are located beyond the Grade B contours of some stations in the area yet the stations compete for economic support. *See Cable Television Report & Order*, 36 FCC 2d 143, 176 (1972).

5. In evaluating past requests for hyphenation of a market, the Commission has considered the following factors as relevant to its examination: (1) the distance between the existing designated communities and the community proposed to be added to the designation; (2) whether cable carriage, if afforded to the subject station, would extend to areas beyond its Grade B signal coverage area; (3) the presence of a clear showing of a particularized need by the station requesting the change of market designation; and (4) an indication of benefit to the public from the proposed change. Each of these factors helps the Commission to evaluate individual market conditions consistent "with the underlying competitive purpose of the market hyphenation rule to delineate areas where stations can and do, both actually and logically, compete."[5]

6. Section 4 of the Cable Act, which amended Section 614 of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. §614, requires the Commission to make revisions needed to update the list of top 100 television markets and their designated communities in Section 76.51 of the Commission's Rules. *See* Section 614(f) of the Act.[6] The Commission stated that where sufficient evidence has

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[1] The Commission has delegated to the Chief, Mass Media Bureau, authority to act on petitions for rule making seeking market redesignation and has stated that it expects "that requests for specific hyphenated market changes that appear worthy of consideration will be routinely docketed and issued as rulemaking proposals." *See Report and Order* in MM Docket No. 92-259 (Broadcast Signal Carriage Issues), 8 FCC Rcd 2965, 2977-78, n.150 (1993).

[2] 768 F. 2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

[3] On August 2, 1985, the Commission issued a Public Notice announcing that the Court of Appeals' decision had "vacated the Commission's 'must carry' rules . . . ," and shortly thereafter the Chief, Mass Media Bureau, dismissed, among others, the subject petition. *See Order*, MM Mimeo No. 6980, released September 10, 1985.

[4] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[5] *See, e.g., TV 14, Inc. (Rome, Ga.)*, 7 FCC Rcd 8591, 8592 (1992), *citing Major Television Markets (Fresno-Vidalia, California)*, 57 RR 2d 1122, 1124 (1985). *See also Press Broadcasting Company, Inc.*, 8 FCC Rcd 94, 95 (1993).

[6] In connection with the implementation of the broadcast signal carriage provisions of the Cable Act, the Commission concluded that a major update of Section 76.51 was not necessary based on the record then before it. Nevertheless, the Com-

been presented tending to demonstrate commonality between the proposed community to be added to a market designation and the market as a whole, such cases will be considered under an expedited rulemaking procedure consisting of the issuance of a Notice of Proposed Rule Making based on the submitted petition.

THE PETITION

7. In its petition, CTC claims that amendment of Section 76.51 of the Commission's Rules to include the community of Clearwater as a designated community in the subject television market is appropriate to reflect competitive realities and is necessary to equalize competition among local television stations. CTC contends that WCLF's market location necessarily places it in competition with the other television stations licensed to communities in the Tampa-St. Petersburg market. It states that Clearwater is part of what is commonly known as the Tampa Bay area, which comprises the tri-city market of Clearwater, Tampa and St. Petersburg. CTC states that these communities, because of their close proximity (it notes that Clearwater and Tampa city limits are connected at their east-west boundaries), share common social, cultural, trade and economic interests.[7]

8. CTC contends that the commonality among these communities is also evidenced by the overlapping signal coverage provided by area stations. It states that WCLF places a Grade A signal contour over the television market, and places a city-grade signal over Tampa and over a substantial portion of St. Petersburg.[8] CTC states that the Grade B signals of stations licensed to Tampa and St. Petersburg totally encompass Clearwater. CTC also notes that both Nielsen and Arbitron include Clearwater in the Tampa-St. Petersburg market, as do program distributors who make programming available to WCLF at Tampa-St. Petersburg market rates.[9] Further, CTC states that WCLF's pricing structure reflects the fact that, although licensed to Clearwater, the station derives a substantial portion of its revenue from other cities in the market.

9. CTC alleges that despite WCLF's competitive position in the market, because Clearwater is not a designated community in the Section 76.51 market listings, the station is not considered a "local signal" for copyright purposes throughout the Tampa-St. Petersburg market in which it competes.[10] According to CTC, absent the requested amendment of Section 76.51, some area cable systems would incur increased copyright liability by carrying WCLF placing the station at a competitive disadvantage to other market-area stations. Moreover, CTC believes that WCLF's competitive disadvantage threatens its independent voice in the market.

DISCUSSION

10. Based on the facts presented, we believe that a sufficient case for redesignation of the subject market has been set forth so that this proposal should be tested through the rulemaking process, including the comments of interested parties. It appears from the information before us that WCLF and stations licensed to communities in the Tampa-St. Petersburg television market do compete for audiences and advertisers throughout much of the proposed combined market area, and that evidence has been presented tending to demonstrate commonality between the proposed community to be added to a market designation and the market as a whole. Moreover, CTC's proposal appears to be consistent with the Commission's policies regarding redesignation of a hyphenated television market.

ORDERING CLAUSE

11. For the reasons set forth above, we believe that CTC has set forth an adequate showing to justify the grant of its petition for reconsideration and the initiation of a rulemaking proceeding to amend Section 76.51 of the Commission's Rules. Accordingly, pursuant to delegated authority, IT IS ORDERED that the petition for reconsideration of the September 25, 1985 dismissal of its petition for rule making IS GRANTED, and its petition for rule making IS REINSTATED and IS GRANTED to the extent indicated herein.

ADMINISTRATIVE MATTERS

Ex Parte Rules -- Non-Restricted Proceeding

12. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, provided they are disclosed as provided in the Commission's Rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203 and 1.1206(a).

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mission did make some minor revisions to Section 76.51 of the Rules, and announced that it would consider further revisions to the list of television markets on a case-by-case basis. *See Report and Order* in MM Docket No. 92-259, *supra*.

[7] In this regard, CTC attaches letters from area political leaders recognizing the common links between these communities.

[8] CTC notes, in this regard, WCLF shares a transmitter tower with WTSP, Channel 10, St. Petersburg.

[9] CTC asserts that while WCLF places a primary emphasis on the programming needs and interests of its community of license, it also airs programming which addresses the needs and interests of Tampa and St. Petersburg and features guests from those communities. These efforts, according to CTC, also place WCLF in direct competition with other market stations.

[10] Stations licensed to communities specifically designated in Section 76.51 are considered local for all cable systems within the 35-mile zones of all listed communities in a given hyphenated market. The absence of Clearwater as a designated community in this market list results in WCLF's classification as a "distant signal" for market-area cable systems more than 35 miles from Clearwater. Moreover, we note that Section 76.58(d) of the Commission's Rules required a cable operator to notify all local television stations by May 3, 1993, that they may not be entitled to mandatory carriage on the system because such carriage may cause an increased copyright liability to the cable system. Under the provisions of Section 76.55(c)(2) of the Rules, a local commercial television station otherwise entitled to mandatory carriage need not be carried on market-area cable systems if the station is considered a "distant signal" under the copyright compulsory license (17 U.S.C. §111) and the station does not agree to indemnify the cable operator for the increased copyright liability. *See Report and Order* in MM Docket No. 92-259, 8 FCC Rcd at 2973-74.

Comment Information

13. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **August 27, 1993,** and reply comments on or before **September 13, 1993**. All relevant and timely comments will be considered before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

Initial Regulatory Flexibility Analysis

14. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because if the proposed rule amendment is promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. A few television licensees and permittees will be affected by the proposed rule amendment. The Secretary shall send a copy of this *Notice of Proposed Rule Making,* including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

Additional Information

15. For additional information on this proceeding, contact Alan E. Aronowitz, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 92-136

In the Matter of

Amendment of Part 97 of the	RM-7894
Commission's Rules to Relax	RM-7895
Restrictions on the Scope of	RM-7896
Permissible Communications in	
the Amateur Service.	

REPORT AND ORDER

Adopted: July 15, 1993; Released: July 28, 1993

By the Commission:

I. INTRODUCTION

1. In the *Notice of Proposed Rule Making* (*Notice*)[1] in this proceeding we proposed to amend the amateur service rules to permit greater flexibility for amateur stations while transmitting communications for public service projects and personal matters without altering in any way the nature and purpose of the amateur service. This *Report and Order* adopts the rules substantially as proposed.

II. DISCUSSION

2. The international Radio Regulations define the amateur service as a radiocommunication service for the purpose of self-training, intercommunication and technical investigations carried out by amateurs, that is, by duly authorized persons interested in radio technique solely with a personal aim and without pecuniary interest.[2] For this reason, Section 97.113(a) of the Commission's Rules, 47 C.F.R. § 97.113(a) prohibits amateur stations from transmitting any communications the purpose of which is to facilitate the business or commercial affairs of any party, or as an alternative to other authorized radio services. The amateur service community, however, generally desires a relaxation of this restriction to accommodate contemporary communications demands and the operational capabilities of amateur station licensees. Noting that it appears the amateur community appreciates both the benefits and the burdens of such relaxation, we proposed to relax the restriction. Over eighty comments and reply comments were filed in response to the *Notice*.

3. The comments convincingly support the proposal. Although some comments urge caution to prevent exploitation of the service,[3] they show that the present rules hamper amateur operators from serving the public as well as diminish the value of the amateur service in satisfying personal communication needs. The vast majority of comments support our proposal to relax the prohibition against using the amateur service as an alternative to other radio services such as the maritime services, land mobile radio services or the cellular telephone service. They believe that the current prohibition is overly cautious and unnecessary.[4] We concur. The capabilities of modern mobile communication services have all but eliminated the incentive to use the amateur service instead of those services. We will relax, therefore, the current prohibition, as proposed, to provide amateur operators greater flexibility for public service and personal communications.

4. The American Radio Relay League (League) notes that it expects no noticeable change in amateur operations as a result of this rule making.[5] This relaxation of the restrictions contained in the rules allows the amateur community to satisfy its contemporary needs for communications in return for greater responsibility for self-regulation and cooperation in the use of its allocated frequencies. This relaxation also will satisfy the desire of the licensees of many amateur stations to retransmit propagation and weather forecast information originating from United States Government stations. The revised rule provides, therefore, that propagation and weather forecast information intended for use by the general public and originated from United States Government stations can be retransmitted by any amateur station without permission of any government agency. In addition, as requested by the League, we shall clarify that the rule requiring prior approval for amateur station retransmission of United States Government communications applies only to communications, including incidental background music, between a space shuttle and its associated earth stations.

5. Some comments suggest even greater relaxation than we proposed.[6] The League, however, states that the proposed rule is a good, workable middle ground offering the requisite protection against exploitation.[7] The National Association of Broadcasters and The Radio-Television News Directors Association (NAB/RTNDA) request that we eliminate the existing immediacy requirement before amateur operators can become involved in news gathering activities.[8] The NAB/RTNDA wants amateur operators to be able to disseminate any news information when no

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[1] 7 FCC Rcd 4231 (1992).

[2] *See* No. 53 of the ITU Radio Regulations (Geneva, 1990) (hereafter Radio Regulations). The essence of this definition is carried over to the Communications Act of 1934, as amended, which regulates the amateur service in the United States, and to various Commission rule sections. *See* 47 U.S.C. § 153(q) and Sections 97.3(a)(4) and 97.113 of the Commission's Rules, 47 C.F.R. §§ 97.3(a)(4) and 97.113.

[3] Reply comments of the Portland Amateur Radio Club at 2, comment of Wireless Institute of New Orleans at 2.

[4] Section 97.113(a) states, in part: No station shall transmit communications as an alternative to other authorized radio services, except as necessary to providing emergency communications.

[5] Comments of League at 2-3.

[6] For example, see comments of Paul S. Courson at 1, Robert J. Roehrig at 1, Joseph Eisenberg at 1, Santa Barbara Amateur Radio Club (SBARC) at 1.

[7] Comments of the League at 9.

[8] *See* Section 97.113(c) of the Commission's Rules, 47 C.F.R. § 97.113(c).

other means of communications are available.[9] Mr. Michael Lonneke states, however, that the NAB/RTNDA request is a self-serving idea designed to offset shrinking news budgets and smaller news staffs.[10] The League also opposes the NAB/RTNDA request. It states that NAB/RTNDA is attempting to revisit an issue twice resolved against it and that we should not modify the proposed rule to accommodate NAB/RTNDA.[11] We do not believe that the amateur service frequencies should be used generally for news gathering and, therefore, we are retaining the immediacy requirement for news gathering activities.

6. The one detail that we are not able to accommodate is the League's request that we provide a list of anecdotal examples of permitted and prohibited communications. For us to do so would necessitate that we intrude upon the day-to-day functioning of the amateur service to a far greater degree than we desire. Further, in view of the wide diversity in the types of communications in which amateur operators want to engage, there would have to be thousands of examples. Therefore, we decline to devote staff resources to the development and maintenance of such a list. Rather, we will rely on the amateur service's traditions of self-regulation and cooperation between licensees, the cornerstones of the amateur service, to determine whether specific communications should be transmitted on amateur service frequencies. We also will include the League's criterion, which we have incorporated in the rules we are adopting in this proceeding, that any amateur-to-amateur communication is permitted unless specifically prohibited, or unless transmitted for compensation, or unless done for the pecuniary benefit of the station control operator or his or her employer.[12]

7. In summary, we have decided to amend the amateur service rules substantially as proposed by the League in order to allow amateur operators more flexibility to provide communications for public service projects as well as to enhance the value of the amateur service in satisfying personal communications needs. Amendment of the rules as the League requests will allow licensees to use amateur service frequencies, for example, to facilitate events such as races and parades, to support educational activities, to provide personal communications such as making appointments and ordering food, to collect data for the National Weather Service, and to provide assistance voluntarily even where there are other authorized radio services available. We believe that this action will expand the benefits derived from the amateur service by the general public as well as amateur service licensees.

III. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED that effective 30 days after publication in the Federal Register Part 97 of the Commission's Rules, 47 C.F.R. Part 97, IS AMENDED as set forth below. Authority for this action is found in Sections 301, 303(l)(1) and (r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 301, 303(l)(1) and (r).

9. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

10. For further information, contact the Personal Radio Branch, Special Services Division at (202) 632-4964.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX

Part 97 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

Part 97 - Amateur radio service

1. The authority citation for Part 97 continues to read as follows:

Authority citation: 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 303. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. §§ 151-155, 301-609, unless otherwise noted.

2. Section 97.113 is revised to read as follows:

§ 97.113 Prohibited transmissions.

(a) No amateur station shall transmit:

(1) Communications specifically prohibited elsewhere in this Part;

(2) Communications for hire or for material compensation, direct or indirect, paid or promised, except as otherwise provided in these rules;

(3) Communications in which the station licensee or control operator has a pecuniary interest, including communications on behalf of an employer. Amateur operators may, however, notify other amateur operators of the availability for sale or trade of apparatus normally used in an amateur station, provided that such activity is not conducted on a regular basis;

(4) Music using a phone emission except as specifically provided elsewhere in this Section; communications intended to facilitate a criminal act; messages in codes or ciphers intended to obscure the meaning thereof, except as otherwise provided herein; obscene or indecent words or language; or false or deceptive messages, signals or identification;

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[9] See Joint Comments of The National Association of Broadcasters and The Radio-Television News Directors Association at 1-3.

[10] Reply Comment of Michael Lonneke at 2.

[11] Reply Comments of the League at 6-9.

[12] RM-7895 at 2-11. The content of messages transmitted between amateur stations located in different countries is subject to international Radio Regulation No. 2732. This Radio Regulation is codified as Section 97.117 of the Commission's Rules, 47 C.F.R. § 97.117. Content restriction on messages between an amateur station located at a place where the amateur service is regulated by the FCC and a station within the jurisdiction of any foreign government is not affected by this amendment of Section 97.113.

(5) Communications, on a regular basis, which could reasonably be furnished alternatively through other radio services.

(b) An amateur station shall not engage in any form of broadcasting, nor may an amateur station transmit one-way communications except as specifically provided in these rules; nor shall an amateur station engage in any activity related to program production or news gathering for broadcasting purposes, except that communications directly related to the immediate safety of human life or the protection of property may be provided by amateur stations to broadcasters for dissemination to the public where no other means of communication is reasonably available before or at the time of the event.

(c) A control operator may accept compensation as an incident of a teaching position during periods of time when an amateur station is used by that teacher as a part of classroom instruction at an educational institution.

(d) The control operator of a club station may accept compensation for the periods of time when the station is transmitting telegraphy practice or information bulletins, provided that the station transmits such telegraphy practice and bulletins for at least 40 hours per week; schedules operations on at least six amateur service MF and HF bands using reasonable measures to maximize coverage; where the schedule of normal operating times and frequencies is published at least 30 days in advance of the actual transmissions; and where the control operator does not accept any direct or indirect compensation for any other service as a control operator.

(e) No station shall retransmit programs or signals emanating from any type of radio station other than an amateur station, except propagation and weather forecast information intended for use by the general public and originated from United States Government stations and communications, including incidental music, originating on United States Government frequencies between a space shuttle and its associated Earth stations. Prior approval for shuttle retransmissions must be obtained from the National Aeronautics and Space Administration. Such retransmissions must be for the exclusive use of amateur operators. Propagation, weather forecasts, and shuttle retransmissions may not be conducted on a regular basis, but only occasionally, as an incident of normal amateur radio communications.

* * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Request by Word of God Fellowship, Inc., to Amend Section 76.51 of the Commission's Rules to Include Decatur, Texas, in the Dallas-Fort, Worth, Texas, Television Market

ORDER

Adopted: July 16, 1993; Released: July 28, 1993

By the Chief, Mass Media Bureau:

1. Before the Commission is a petition for rule making filed by Word of God Fellowship, Inc., permittee of KMPX-TV, seeking to amend Section 76.51 of the Commission's Rules, 47 C.F.R. §76.51, to change the designation of the Dallas-Fort Worth television market to include the community of Decatur, Texas. For reasons detailed below, we are denying the petitioner's request.

2. **Background**. Section 76.51 of the Commission's Rules enumerates the top 100 television markets and the designated communities within those markets. Among other things, this market list is used to determine territorial exclusivity rights under Section 73.658(m) and helps define the scope of compulsory copyright license liability for cable operators. *See* 47 CFR §76.658(m) and 17 U.S.C. §111(f). Some of the markets consist of more than one named community (a "hyphenated market"). Such "hyphenation" of a market is based on the premise that stations licensed to any of the named communities in the hyphenated market do, in fact, compete with all stations licensed to such communities. *See CATV-Non Network Agreements*, 46 FCC 2d 892, 898 (1974). Market hyphenation "helps equalize competition" where portions of the market are located beyond the Grade B contours of some stations in the area yet the stations compete for economic support. *See Cable Television Report & Order*, 36 FCC 2d 143, 176 (1972).

3. In evaluating past requests for hyphenation of a market, the Commission has considered the following factors as relevant to its examination: (1) the distance between the existing designated communities and the community proposed to be added to the designation; (2) whether cable carriage, if afforded to the subject station, would extend to areas beyond its Grade B signal coverage area; (3) the presence of a clear showing of a particularized need by the station requesting the change of market designation; and (4) an indication of benefit to the public from the proposed change. Each of these factors helps the Commission to evaluate individual market conditions consistent "with the underlying competitive purpose of the market hyphenation rule to delineate areas where stations can and do, both actually and logically, compete."[1]

4. Section 4 of the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act").[2] which amended Section 614 of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. §614, requires the Commission to make revisions needed to update the list of top 100 television markets and their designated communities in Section 76.51 of the Commission's Rules. *See* Section 614(f) of the Act.[3] The Commission stated that where sufficient evidence has been presented tending to demonstrate commonality between the proposed community to be added to a market designation and the market as a whole, such cases will be considered under an expedited rulemaking procedure consisting of the issuance of a Notice of Proposed Rule Making based on the submitted petition.

5. **The Petition**. In support of its request, Word of God Fellowship alleges that if the Commission amends Section 76.51 as requested, cable systems in the vicinity of Dallas will be able to carry KMPX "without concern for adverse financial implications because of copyright obligations." It notes that Decatur is included in Arbitron's Dallas-Fort Worth ADI. Word of God Fellowship also states that Dallas-Fort Worth stations have "significantly viewed" status in Wise County (where Decatur is situated), and that there are common cultural, social and economic interests in the subject community. Finally, Word of God Fellowship states that KMPX will put a city-grade signal over both Dallas and Ft. Worth, and that the station will compete with market-area stations for the acquisition of programming.

6. **Discussion**. Based on the facts presented, we do not believe that a sufficient case for redesignation of the subject market has been set forth. As noted above, Word of God Fellowship is the permittee of unbuilt station KMPX, Decatur. Because KMPX is an unbuilt facility, the asserted coverage area and competitive position in the market are not, at this point, concrete. The signal coverage information upon which Word of God Fellowship relies in its request is based on a proposal for an unbuilt station, not on the predicted coverage of an operating facility. In addition, there can be no direct and genuine competition with other area stations until the station is on the air. In spite of Word of God Fellowship's assertions to the contrary, virtually no evidence upon which the Commission's analysis is generally based currently exists in this case.

7. Moreover, we note that Word of God Fellowship has a pending request to change KMPX(TV)'s community of license to Plano, Texas. Word of God Fellowship also recently filed a request for a Special Temporary

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[1] *See, e.g., TV 14, Inc. (Rome, Ga.)*, 7 FCC Rcd 8591, 8592 (1992), *citing Major Television Markets (Fresno-Vidalia, California)*, 57 RR 2d 1122, 1124 (1985). *See also Press Broadcasting Company, Inc.*, 8 FCC Rcd 94, 95 (1993).

[2] Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[3] In connection with the implementation of the broadcast signal carriage ("must-carry") provisions of the Cable Act, the Commission concluded that a major update of Section 76.51 was not necessary based on the record then before it. Nevertheless, the Commission did make some minor revisions to Section 76.51 of the Rules, and announced that it would consider further revisions to the list of television markets on a case-by-case basis, delegating authority to act on such petitions to the Chief, Mass Media Bureau. *See Report and Order* in MM Docket No. 92-259, 8 FCC Rcd 2965, 2978 n.150 (1993).

Authorization (STA) to construct the station at reduced facilities -- *i.e.*, with a waiver of the city-grade signal coverage requirement -- in order to become operational so that it could qualify for must-carry status. The request for STA was denied by the Chief, Video Services Division.[4] These requests emphasize the speculative nature of the petitioner's operations and the lack of basis for reevaluating the subject market at this time.

8. For the reasons set forth above, we believe that Word of God Fellowship has failed to make an adequate showing to justify initiating a rulemaking proceeding that would reevaluate the designation of the Dallas-Fort Worth, Texas, television market. We, therefore, deny their petition for rule making to amend Section 76.51 of the Commission's Rules, 47 C.F.R. §76.51.

9. Accordingly, pursuant to delegated authority, IT IS ORDERED that the petition for rule making filed by Word of God Fellowship IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[4] *See* Letter Denial (Chief, Video Services Division, May 24, 1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
July 19, 1993

Released: July 28, 1993

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

KEVN, Inc. 1800E
Licensee, KEVN-TV and KIVV-TV
One Galleria Tower, Suite 1500
13355 Noel Road, Lock Box 21
Dallas, Texas 75240

Dear Licensee:

This letter constitutes a NOTICE OF APPARENT LIABILITY FOR A FORFEITURE in the amount of fifteen thousand dollars ($15,000) pursuant to Section 503(b) of the Communications Act of 1934, as amended, under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules, for repeated violations of the Commission's rule limiting the amount of commercial matter that may be aired during children's programming.

When Congress adopted the Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. Sections 303a, 303b and 394, it required the Commission to adopt rules, *inter alia*, limiting the number of minutes of commercial matter that television stations may air during children's programming and to consider in its review of television license renewals the extent to which the licensee has met the commercial limits. The Commission adopted policies and regulations to implement Congress' mandate in *Children's Television Programming*, 6 FCC Rcd 2111, *recon. granted in part*, 6 FCC Rcd 5093 (1991). Among the regulations adopted was 47 C.F.R. Section 73.670, which provides that:

> No commercial television broadcast station licensee shall air more than 10.5 minutes of commercial matter per hour during children's programming on weekends, or more than 12 minutes of commercial matter per hour on weekdays.

These commercial limitations became effective on January 1, 1992. *Children's Television Programming*, 6 FCC Rcd 5529 (1991).

On November 30, 1992, you filed applications for renewal of license (FCC Form 303-S) for KEVN-TV, Rapid City, South Dakota (BRCT-921130LH), and KIVV-TV, Lead, South Dakota (BRCT-921130KY). You also filed supplements to FCC Form 303-S which contain questions to determine whether the licensee has complied with the limits on commercial matter as set forth in 47 C.F.R. Section 73.670. In these supplements, you indicated that KEVN-TV and KIVV-TV had failed to comply with the limitations on commercial matter during children's programming during their last license terms. You also attached to each application, as Exhibit 3, an explanation of your noncompliance.

In Exhibit 3, you explained that KIVV-TV operates as a satellite of KEVN-TV. Thus, the programming and the excess commercial matter during children's programming were the same on both stations. You revealed that from January 1992, through September 1992, KEVN-TV and KIVV-TV repeatedly exceeded the commercial limits during children's programming aired on weekdays. These commercial overages included 27 60-second overages and 31 30-second overages. You claimed that the overages resulted from "the Station management's misunderstanding of the new rules and their applicability to children's programs acquired through barter arrangements." You also contended that there were many occasions when you did not exceed the Commission's commercial limits.

You further contend that the management of Stations KEVN-TV and KIVV-TV now understand, and are fully compliant with, the Commission's rule. You indicate that the stations' staff has been made fully aware of the commercial limits and that management monitors compliance on a daily basis.

Your record of exceeding the Commission's limits on commercial matter during children's programming on 58 occasions during your license period after these limits became effective, constitutes a repeated rule violation. Accordingly, pursuant to Section 503(b) of the Communications Act, KEVN, Inc., is hereby advised of its apparent liability for forfeiture of fifteen thousand dollars ($15,000) for its apparent repeated violation of 47 C.F.R. Section 73.670. The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Communications Act and the guidelines set forth in our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied*, 7 FCC Rcd 5339 (1992), *pet. for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992).

Under these standards, $10,000 is the base forfeiture for violation of our children's television commercialization limits. An upward adjustment of the base forfeiture amount may be warranted under established criteria such as egregious misconduct or when the violation is repeated or continuous. In determining the appropriate forfeiture amount for this violation of the commercial limits during children's programming, we have taken into consideration several factors of particular importance. We have considered the number of instances of commercial overages and the length of each overage. We have also considered the period of time over which such overages occurred. Finally, we have considered whether or not the licensee established an effective program to monitor compliance.

The 58 occasions on which you repeatedly exceeded the Commission's limits on commercial matter during children's programming is a high number of violations. Moreover, all of these commercial overages were 30 seconds in length, or longer. Thus, one or more 30-second commercials were carried on each of these occasions. On 27 occasions, 60 seconds or more of excess commercial matter were aired. This high number of repeated instances of commercial overages and the length of these overages clearly indicate that you did not establish an effective program to monitor compliance with the Commission's commercial limits. When the Commission delayed the effective date of 47 C.F.R. 73.670 until January 1, 1992, it stated that, "giving the additional time to broadcasters and cable oper-

ators before compliance with the commercial limits is required will have the effect of enabling broadcasters and cable operators to hone their plans to ensure compliance [and], in the context of any enforcement action for violations of the limits, we would be unlikely to be sympathetic to claims of difficulties." *Children's Television Programming*, 6 FCC Rcd at 5530 n.10. You have not proffered any extraordinary transitional or other difficulties that prevented Stations KEVN-TV and KIVV-TV from complying with the children's advertising limitations during their license periods. Nor have you offered an explanation of your "misunderstanding" of the rule and its application to barter programming. Moreover, apparently you did not review the stations' programming for compliance with the commercial limits until your license period was nearly over. Your inattention to this important licensee obligation caused both stations to exceed the commercial limits throughout most of your license period after the limits became effective. The fact that now you may have implemented a plan to eliminate future commercial overages, does not relieve you of liability for prior violations. *See International Broadcasting Corp.*, 19 FCC 2d 793 (1969). Consideration of these factors warrants an upward adjustment of the forfeiture amount.

Notwithstanding this action, we find you qualified to remain a Commission licensee and conclude that grant of your applications for renewal of license for Stations KEVN-TV and KIVV-TV would serve the public interest. Therefore, your applications, BRCT-921130LH and BRCT-921130KY, ARE HEREBY GRANTED.

With respect to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. Section 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
July 19, 1993

Released: July 28, 1993

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

WKBD, Inc.
Licensee, WKBD(TV)
26905 West Eleven Mile Road
Southfield, Michigan 48034

Dear Licensee:

This letter constitutes a NOTICE OF APPARENT LIABILITY FOR A FORFEITURE in the amount of fifteen thousand dollars ($15,000) pursuant to Section 503(b) of the Communications Act of 1934, as amended, under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules, for repeated violations of the Commission's rule limiting the amount of commercial matter that may be aired during children's programming.

When Congress adopted the Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. Sections 303a, 303b and 394, it required the Commission to adopt rules, *inter alia*, limiting the number of minutes of commercial matter that television stations may air during children's programming and to consider in its review of television license renewals the extent to which the licensee has met the commercial limits. The Commission adopted policies and regulations to implement Congress' mandate in *Children's Television Programming*, 6 FCC Rcd 2111, *recon. granted in part*, 6 FCC Rcd 5093 (1991). Among the regulations adopted was 47 C.F.R. Section 73.670, which provides that:

> No commercial television broadcast station licensee shall air more than 10.5 minutes of commercial matter per hour during children's programming on weekends, or more than 12 minutes of commercial matter per hour on weekdays.

These commercial limitations became effective on January 1, 1992. *Children's Television Programming*, 6 FCC Rcd 5529 (1991).

On May 27, 1992, you filed applications for renewal of license (FCC Form 303-S) for WKBD(TV), Detroit, Michigan (BRCT-920527KG). You also filed a supplement to FCC Form 303-S which contains questions to determine whether the licensee has complied with the limits on commercial matter as set forth in 47 C.F.R. Section 73.670. In the supplement, you indicated that WKBD(TV) had complied with the limitations on commercial matter during children's programming during your last license term. Your application for renewal of license was granted on October 1, 1992. However, in a letter dated October 2, 1992, your attorney notified the Commission that you had discovered that WKBD(TV) had in fact exceeded the limits on commercial matter during children's programming. By amendment dated October 23, 1992, you provided a complete list of the occasions on which the commercial limits were exceeded and an explanation for the overages. The grant of your application for renewal of license was rescinded as of October 27, 1992.

In your October 23, 1992 amendment, you explain that the audits for the first two quarters of 1992, which were conducted in order to certify compliance with the commercial limits, used an improper methodology. This occurred because your traffic personnel did not understand the relevant requirements. A reaudit of the commercials you carried during children's programming indicated that you had exceeded the commercial limits on 70 occasions during your license period after the limits went into effect. There were 11 60-second overages, 58 30-second overages and one 15-second overage. You claim that there were five basic causes for the commercial overages. First, some commercials were mistakenly coded as promotional material because of human error. Second, some commercial overages were caused when Fox Broadcasting Company made last-minute changes in program formats and additional commercials were inserted. Third, two programs that you carried had commercial formats that were different than what your traffic personnel thought they were. Fourth, some of the commercial overages were caused by last minute movements of commercials out of programs into adjacent times that were in a different clock hour or from a program adjacency outside the program's clock hour to a position within the program itself. Fifth, some announcements involving events jointly promoted by the station and a sponsor inadvertently were not counted as commercials because of a misunderstanding concerning what constituted commercial matter under the children's programming rules.

You contend that in all but fourteen of the commercial overages, the total amount of commercials within the children's programming block of two to two and one half hours did not exceed the total amount of commercials allowable during that block of time. You argue that because of this circumstance, the overages should be considered *de minimis*. You also state that you have instituted stringent compliance procedures to avoid any recurrence.

Your record of exceeding the Commission's limits on commercial matter during children's programming on 70 occasions during your license period after these limits became effective, constitutes a repeated rule violation. Accordingly, pursuant to Section 503(b) of the Communications Act, WKBD, Inc., is hereby advised of its apparent liability for forfeiture of fifteen thousand dollars ($15,000) for its apparent repeated violation of 47 C.F.R. Section 73.670. The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Communications Act and the guidelines set forth in our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied*, 7 FCC Rcd 5339 (1992), *pet. for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992).

Under these standards, $10,000 is the base forfeiture for violation of our children's television commercialization limits. An upward adjustment of the base forfeiture amount may be warranted under established criteria such as egregious misconduct or when the violation is repeated or continuous. In determining the appropriate forfeiture

amount for this violation of the commercial limits during children's programming, we have taken into consideration several factors of particular importance. We have considered the number of instances of commercial overages and the length of each overage. We have also considered the period of time over which such overages occurred. Finally, we have considered whether or not the licensee established an effective program to monitor compliance.

The 70 occasions on which you repeatedly exceeded the Commission's limits on commercial matter during children's programming is a high number of violations. Moreover, all but one of these commercial overages were 30 seconds in length, or longer. Thus, one additional 30-second commercial was carried on 58 occasions. On 11 occasions, 60 seconds of excess commercial matter was aired. This high number of repeated instances of commercial overages and the length of these overages clearly indicate that you did not establish an effective program to monitor compliance with the Commission's commercial limits. When the Commission delayed the effective date of 47 C.F.R. 73.670 until January 1, 1992, it stated that, "giving the additional time to broadcasters and cable operators before compliance with the commercial limits is required will have the effect of enabling broadcasters and cable operators to hone their plans to ensure compliance [and], in the context of any enforcement action for violations of the limits, we would be unlikely to be sympathetic to claims of difficulties." *Children's Television Programming*, 6 FCC Rcd at 5530 n.10. You have not proffered any extraordinary transitional or other difficulties that prevented Station WKBD(TV) from complying with the children's advertising limitations during your license period. Indeed, you admit that in many instances station personnel simply misunderstood the rule and improperly applied it to your programs and commercials.

Moreover, your review of the stations' programming for compliance with the commercial limits was also based on a misunderstanding of the Commission's rule. Your inattention to this important licensee obligation caused WKBD(TV) to exceed the commercial limits throughout most of your license period after the limits became effective. The fact that now you may have implemented a plan to eliminate future commercial overages, does not relieve you of liability for prior violations. *See International Broadcasting Corp.*, 19 FCC 2d 793 (1969). Nor does the fact that the amount of commercials within the station's overall children's programming block of time did not exceed the total amount of commercialization allowable relieve you of liability for the numerous overages that did occur in the relevant clock hours. See *Children's Television Programming*, 6 FCC Rcd at 2117. Consideration of these factors warrants an upward adjustment of the base forfeiture amount.

Notwithstanding this action, we find you qualified to remain a Commission licensee and conclude that grant of your application for renewal of license would be in the public interest. Therefore, your application, BRCT-920527KG, IS HEREBY GRANTED.

With respect to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. Section 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
July 19, 1993

Released: July 28, 1993

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

Big Horn Communications, Inc.
Licensee, KCTZ(TV)
445 S. 24th Street West
Billings, Montana 59102

Dear Licensee:

This letter constitutes a NOTICE OF APPARENT LIABILITY FOR A FORFEITURE in the amount of fifteen thousand dollars ($15,000) pursuant to Section 503(b) of the Communications Act of 1934, as amended, under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules for repeated violations of the Commission's rule limiting the amount of commercial matter that may be aired during children's programming.

When Congress adopted the Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. Sections 303a, 303b and 394, it required the Commission to adopt rules, *inter alia*, limiting the number of minutes of commercial matter that television stations may air during children's programming and to consider in its review of television license renewals the extent to which the licensee has met the commercial limits. The Commission adopted policies and regulations to implement Congress' mandate in *Children's Television Programming*, 6 FCC Rcd 2111, *recon. granted in part*, 6 FCC Rcd 5093 (1991). Among the regulations adopted was 47 C.F.R. Section 73.670, which provides that:

> No commercial television broadcast station licensee shall air more than 10.5 minutes of commercial matter per hour during children's programming on weekends, or more than 12 minutes of commercial matter per hour on weekdays.

These commercial limitations became effective on January 1, 1992. *Children's Television Programming*, 6 FCC Rcd 5529 (1991).

On December 1, 1992, you filed an application for renewal of license (FCC Form 303-S) for KCTZ(TV), Bozeman, Montana (BRCT-921201KX). You also filed a supplement to FCC Form 303-S which contains questions to determine whether the licensee has complied with the limits on commercial matter as set forth in 47 C.F.R. Section 73.670. In this supplement, you indicated that KCTZ(TV) had failed to comply with the limitations on commercial matter during children's programming during your last license term. You also attached, as Exhibit C, an explanation of your noncompliance.

In Exhibit C, you revealed that from January 1992, through September 1992, KCTZ(TV) repeatedly exceeded the commercial limits during children's programming between 6:30 and 7:00 am on Sundays and between 3:00 and 4:30 pm on weekdays. These commercial overages were as follows: 90 seconds - six times; 70 seconds - one time; 60 seconds - 15 times; 45 seconds - 12 times; and 30 seconds - 21 times. In your explanation of these commercial overages you stated that KCTZ(TV) was operated as an S-2 satellite of KOUS-TV, Hardin, Montana. While KCTZ(TV) rebroadcast much of the programming of KOUS-TV, it frequently substituted its own commercials for the KOUS-TV commercials contained in the programs and, at times, substituted local commercials for public service announcements in the programming. The switchers at KCTZ(TV) were given the discretion to depart from the program logs to insert "make goods" and "run of schedule" commercials. You indicated that because of a lack of communication between the parent station which provided the programming feed and the KCTZ(TV) traffic department, the switchers were unaware of the commercial limits during children's programming.

You contend that the violations of the commercial limits during children's programming were accidental and contrary to the intent of the licensee. Moreover, you claim that you broadcast many children's programs in which there were no commercial overages. You also contend that, because the revenue from the additional commercials was small, you had no incentive to run excess commercials. Finally, you suggest that your problem was caused by a weakness in communication and management.

Apparently, you did not discover the violations of the commercial limits during children's programming until you were preparing the license renewal application for KCTZ(TV). Since that time, you have adopted a new Policy Statement and Procedures for compliance with the Commission's requirements limiting commercial matter during children's programming. These procedures establish detailed responsibilities for various station staff members to assure compliance with the Commission rules. You also indicated that you would file periodic updates, while your license renewal application was pending, to report on compliance with the commercial limits.

Your record of exceeding the Commission's limits on commercial matter during children's programming on 55 occasions during your license period after these limits became effective, constitutes a repeated rule violation. Accordingly, pursuant to Section 503(b) of the Communications Act, Big Horn Communications, Inc., is hereby advised of its apparent liability for forfeiture of fifteen thousand dollars ($15,000) for its apparent repeated violation of 47 C.F.R. Section 73.670. The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Communications Act and the guidelines set forth in our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied*, 7 FCC Rcd 5339 (1992), *pet. for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992).

Under these standards, $10,000 is the base forfeiture for violation of our children's television commercialization limits. An upward adjustment of the base forfeiture amount may be warranted under established criteria such as egregious misconduct or when the violation is repeated or continuous. In determining the appropriate forfeiture amount for this violation of the commercial limits during children's programming, we have taken into consideration

several factors of particular importance. We have considered the number of instances of commercial overages and the length of each overage. We have also considered the period of time over which such overages occurred. Finally, we have considered whether or not the licensee established an effective program to monitor compliance.

The 55 occasions on which you repeatedly exceeded the Commission's limits on commercial matter during children's programming is a high number of violations. Moreover, all of these commercial overages were 30 seconds in length, or longer. Thus, it appears that one or more 30-second commercials were carried on each of these occasions. On 22 occasions 60 seconds or more of excess commercial matter were aired. This high number of repeated instances of commercial overages and the length of these overages clearly indicate that you did not establish an effective program to monitor compliance with the Commission's commercial limits. When the Commission delayed the effective date of 47 C.F.R. Section 73.670 until January 1, 1992, we stated that, "giving the additional time to broadcasters and cable operators before compliance with the commercial limits is required will have the effect of enabling broadcasters and cable operators to hone their plans to ensure compliance [and], in the context of any enforcement action for violations of the limits, we would be unlikely to be sympathetic to claims of difficulties." *Children's Television Programming*, 6 FCC Rcd at 5530 n.10. You have not proffered any extraordinary transitional or other difficulties that prevented Station KCTZ(TV) from complying with the children's advertising limitations during your license period. Indeed, you admit that a failure to communicate the need to comply with the Commission's commercial limits caused the repeated violations. Moreover, you did not review KCTZ(TV)'s programming for compliance with the commercial limits until you were preparing the license renewal application. The fact that now you may have implemented a plan to eliminate future commercial overages does not relieve you of liability for prior violations. *See International Broadcasting Corp.*, 19 FCC 2d 793 (1969). Consideration of these factors warrants an upward adjustment of the forfeiture amount.

Notwithstanding this action, we find you qualified to remain a Commission licensee and conclude that grant of your application for renewal of license for Station KCTZ(TV) would serve the public interest. Therefore, your application, BRCT-921201KX, IS HEREBY GRANTED.

With respect to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. Section 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-259

In the Matter of

Implementation of the Cable
Television Consumer Protection
and Competition Act of 1992

Broadcast Signal Carriage Issues

ORDER

Adopted: July 15, 1993; Released: July 16, 1993

By the Commission:

1. On March 11, 1993, the Commission adopted a *Report and Order*[1] in this proceeding to implement the mandatory television broadcast signal carriage ("must-carry") and retransmission consent provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act").[2] Pursuant to the rules adopted in the *Report and Order*, cable systems were required to commence carriage of local broadcast stations entitled to must-carry status beginning on June, 2, 1993.[3] On June 17, 1993, local broadcast stations were required to make their initial election of must-carry or retransmission consent status and were required to notify cable systems of their election.[4] Those broadcast stations which elected must-carry status were required to notify the cable system of their preferred channel position at that time.[5] Those broadcast stations which failed to elect either must-carry or retransmission consent status are deemed must-carry stations by default.[6]

2. We are concerned that some confusion may exist over whether stations which elected retransmission consent on June 17, 1993, are entitled to continued carriage on a cable system until the October 6, 1993, effective date for retransmission consent.[7] NAB and INTV request clarification that local commercial stations electing retransmission consent retain their must-carry rights until October 6, 1993. NCTA and TWE oppose this request and argue that such an interpretation contradicts the language of Section 325(3)(B) of the 1992 Act, which states that "If an originating television station elects under paragraph (3)(B) to exercise its right to grant retransmission consent under this subsection with respect to a cable system, the provisions of section 614 shall not apply to the carriage of the signal of such station by such cable system." They argue that once the retransmission consent election is made, all must-carry rights are forfeited. In response, NAB contends that because retransmission consent is not effective until October 6, 1993, all other must-carry rights remain effective until that date.

3. We clarify that local broadcast stations which are otherwise entitled to mandatory carriage and which have elected retransmission consent may not have their carriage discontinued by any cable system prior to October 6, 1993, the effective date of their retransmission consent elections.[8] As we stated in the *Report and Order*, the implementation schedule was adopted to reduce the number of changes to which the cable operator and subscribers would be subjected.[9] We rejected cable commenter's suggestions that retransmission consent and must-carry (except for channel positioning requirements) take effect on the same date because we believed Congressional intent precluded us from delaying implementation of must-carry until October 6, 1993.[10] It was our intent that, during the transition period, all eligible signals continue to be carried until such time as the cable operator must discontinue carriage of the signal due to a lack of consent from the broadcast television station. We believe that this approach is consistent with the language of the 1992 Act which provides that must-carry rights are not available to stations that elect retransmission consent. *See* 47 U.S.C. §325(b)(4). Section 325(b)(3)(B), however, provides that the Commission's retransmission consent regulations shall require that television stations make an election between must-carry and retransmission consent "within one year after the date of enactment" of the 1992 Act and every three years thereafter. Reading these two sections together, and based on the reasons set for in the *Report and Order*,[11] it is reasonable to delay the *effectiveness* of stations' retransmission consent election (and thus their forfeiture of must-carry rights) until October 6, 1993.[12] Accordingly, a station choosing retransmission consent is entitled to must-carry until that date. We reaffirm that this approach will be the least disruptive to subscribers and will ensure an orderly transition to retransmission consent. We are amending Section 76.56 of our rules to reflect this clarification.

4. In an effort to assist cable systems in establishing the channel line-up changes which will be required on October 6, 1993, we also take this opportunity to clarify the channel positioning rights of local commercial broadcast

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[1] *Report and Order* in MM Docket 92-259, 8 FCC Rcd 2965 (1993). *See also, Clarification Order*, 58 FR 32449 (June 10, 1993).

[2] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, §§4-6, 106 Stat. 1460 (1992).

[3] 47 C.F.R. § 76.56(a), (b).

[4] 47 C.F.R. § 76.64(f)(1).

[5] 47 C.F.R. § 76.57(d).

[6] 47 C.F.R. § 76.64(f)(3).

[7] Petitions for Reconsideration were filed by National Association of Broadcasters ("NAB"), Association of Independent Television Stations ("INTV") and Community Antenna Television Association ("CATA") which address, in part, the issues relating to carriage between June 17 and October 6 as well as the channel positioning of default must-carry stations. Time Warner Entertainment Company, L.P. ("TWE") and The National Cable Television Association ("NCTA") filed oppositions to which NAB responded. Because of the time-sensitive nature of these issues, we will resolve them in this *Order*. We will address all other issues raised in these petitions in a separate order.

[8] 47 C.F.R. § 76.64(a).

[9] *See Report and Order*, 8 FCC Rcd 3001-2, at paras. 150-157.

[10] *See Report and Order*, 8 FCC Rcd 3001, at para. 153.

[11] 8 FCC Rcd 3001-2, paras. 151-156.

[12] Similarly, when triennial must-carry/retransmission consent elections are made on October 1, they will not become effective until January 1, in order to coordinate with copyright royalty accounting periods.

stations which failed to elect must-carry or retransmission consent and which, therefore, default to must-carry status. We continue to believe that the channel positioning rights of all television broadcast stations were intended by Congress to be determined by the broadcaster and not determined by the cable system.[13] However, in those instances where the broadcaster has failed to make an election and to notify the cable system, we believe it is unfair to leave the cable system uninformed as to where to place the signal. In this regard, NAB and INTV argue that the channel positioning of a default must-carry station should be one of the options specified in the statute. In contrast, the Community Antenna Television Association ("CATA"), TWE and NCTA assert that the channel position of a default must-carry station should be at the discretion of the cable operator, as long as it is placed on the basic service tier. TWE argues that to grant a default must-carry station one of the statutory channel positions would constitute a windfall to the defaulting station. These parties are also concerned that such a rule could lead to conflicting channel positioning rights between stations which made an affirmative must-carry election with a preferred channel position and a default must-carry station which has never been carried and which therefore has only its over-the-air channel as an option. They also argue that granting the statutory channel position provides no incentive for a station to make an affirmative election, as such station will be insured of a preferred channel position. NAB responds that the 1992 Act provides that all must-carry signals will be carried on the channel positions specified in the Act, and that there is no basis for making an exception for stations which are considered must-carry by default.

5. As stated in the *Report and Order*, the default election was to be self-executing without need for interaction between the cable system and the broadcaster. We thus clarify that, after October 6, 1993, cable systems which are required to carry the signal of a default commercial must-carry broadcaster shall place that signal on one of the statutorily defined positions, at the system's discretion.[14] We believe that this will preserve Congress' intent that must-carry stations be carried on their over-the-air, historical or current channel position while allowing the cable system to decide which of the statutory channel positions will be used. We are amending Section 76.57 of our rules to reflect the channel position options of a default must-carry station.

6. In the *Report and Order*, we declined to establish any rules governing conflicts among must-carry stations' requests for specific channels.[15] We now conclude that such rules are necessary to resolve conflicts between local commercial stations that affirmatively elected carriage and those receiving carriage by default. Specifically, in the event of such a conflict, the request from the local commercial station which made an affirmative election should be given priority.[16] We believe this approach is fair to all parties since the default must-carry station could have protected its channel positioning rights by affirmatively electing must-carry and a specific channel position.

7. Accordingly, IT IS ORDERED that pursuant to Section 4(i), 4(j) and 303 of the Communications Act of 1934, as amended, and the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, Part 76 of the Commission Rules, 47 C.F.R. Part 76, Section 76.56 and Section 76.57 ARE AMENDED as set forth in the Appendix.

8. IT IS ORDERED that the rules set forth in the Appendix of this *Order* will be effective on August 30, 1993.

9. IT IS FURTHER ORDERED that the Petitions for Reconsideration filed on behalf of the National Association of Broadcasters and the Association of Independent Television Stations are GRANTED IN PART and the Petition for Reconsideration filed by Community Antenna Television Association is DENIED IN PART, only to the extent specified herein.

10. For further information on this proceeding, contact Elizabeth W. Beaty, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Appendix

Rules

Part 76 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 76 -- CABLE TELEVISION SERVICE

1. The Authority Citation for Part 76 continues to read as follows:

Authority: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat., as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085, 1101; 47 U.S.C. Secs. 152, 153, 154, 301, 303, 307, 308, 309, 532, 533, 535, 542, 543, 552 as amended, 106 Stat, 1460.

2. Section 76.56 is amended by adding a paragraph (b)(7) to read as follows:

§ 76.56 Signal carriage obligations.

[13] *See Report and Order*, 8 FCC Rcd 2987-8, at para. 88.

[14] Section 76.57 states that at the election of the licensee, local commercial stations may be carried on their over-the-air channel, the channel on which they were carried on July 19, 1985, or the channel on which they were carried on January 1, 1992. Broadcast stations may also be carried on any other channel position if mutually agreed upon by the station and the cable operator.

[15] *See Report and Order*, 8 FCC Rcd 2988, at para. 90.

[16] In the event this station has selected the only statutory channel position available to the station carried by default, the cable system may place that station on a channel of the cable system's choice, so long as that channel is included on the basic service tier.

* * * * *

(b) * * *

(7) A local commercial television station carried to fulfill the requirements of this paragraph, which subsequently elects retransmission consent pursuant to Section 76.64 of this chapter, shall continue to be carried by the cable system until the effective date of such retransmission consent election.

* * * * *

3. Section 76.57 is amended by adding a paragraph (e) after the note to read as follows:

§ 76.57 Channel positioning.

* * * * *

(e) Pursuant to Section 76.64(f)(3) of this chapter, a local commercial broadcast television station that fails to make an election is deemed a must-carry station. A cable operator shall carry such a television station on the cable system channel number on which the local commercial television station is broadcast over the air, or on the channel on which it was carried on July 19, 1985, or on the channel on which it was carried on January 1, 1992. In the event that none of these specified channel positions is available due to a channel positioning request from a commercial television station affirmatively asserting its must-carry rights or such a request from a qualified local noncommercial educational station, the cable operator shall place the signal of such a television station on a channel of the cable system's choice, so long as that channel is included on the basic service tier.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-68

In re Applications of

HARRY S. McMURRAY	File No. BPH-880301MP
MODESTO COMMUNICATIONS CORPORATION	File No. BPH-880301NC
BCD LIMITED PARTNERSHIP	File No. BPH-880301OS
THOM REINSTEIN COMMUNICATIONS A California Limited Partnership	File No. BPH-880301OU

For Construction Permit for
New FM Station, Channel 230A,
Modesto, California

ORDER

Adopted: July 13, 1993; Released: July 28, 1993

By the Review Board: MARINO (Chairman), BLUMENTHAL, and GREENE.

1. On June 30, 1993, Modesto Communications Corporation (MCC) filed two motions: one, that seeks leave to withdraw its earlier-filed petition for reconsideration of the Review Board's *Decision* in the above-captioned proceeding, 8 FCC Rcd 3168 (Rev. Bd. 1993); and the second, that urges the Board to refer to the Commission an earlier-filed petition to reopen the record. Thom Reinstein Communications (Reinstein), against whom the original petitions were directed, had filed an opposition to the petition to reopen and a motion to strike the petition for reconsideration, contending that the latter filing was violative of 47 CFR § 1.104(b) because MCC had simultaneously filed an application for review of our *Decision*. Rule 1.104(b) bars a person from filing both an application for review and a petition for reconsideration. Reinstein has also filed, on July 12, 1993, an opposition to the motion for referral to the Commission, contending that the Board lacks authority to "certify" the motion to the Commission. We shall grant MCC's motion to dismiss the petition for reconsideration. Additionally, because the petition to reopen the record does not properly lie before the Board, we shall deny the motion for referral. Nonetheless, we shall informally refer the petition to reopen and Reinstein's opposition to the Commission pursuant to the Commission's directive in *CSJ Investments, Inc.*, 5 FCC Rcd 7653, 7655 n.4 (1990) (misdirected pleadings are to be informally referred to the appropriate official who has authority to act on such matters). *See also Lt. Colonel Cyrus V. Edwards*, 7 FCC Rcd 4558, 4558 ¶ 3.

2. ACCORDINGLY, IT IS ORDERED, That the Motion for Leave to Withdraw Petition for Reconsideration, filed on June 30, 1993, by Modesto Communications Corporation IS GRANTED, and that the Petition for Reconsideration, filed on June 14, 1993, by Modesto Communications Corporation; and the Motion to Strike, filed on June 21, 1993, by Thom Reinstein Communications ARE DISMISSED;

3. IT IS FURTHER ORDERED, That the Motion for Referral to the Commission filed June 30, 1993, by Modesto Communications Corporation IS DENIED; and that the Petition to Reopen Record, Admit Additional Evidence, and Reclose Record filed June 14, 1993 by Modesto Communications Corporation; and the Opposition to Petition to Reopen Record filed June 21, 1993 by Thom Reinstein Communications ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-6

Amendment of Part 22 of the Commission's Rules to Provide for Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules

ORDER

Adopted: July 19, 1993; Released: July 28, 1993

By the Commission:

INTRODUCTION

1. In this order, we address a motion for stay filed April 16, 1993 by The Committee for Effective Cellular Rules (CECR).[1] In its motion CECR requests that the Commission stay the acceptance or grant of fill-in applications from existing cellular licensees that involve the construction of new cell sites[2] in (1) those areas of the respective expanded Cellular Geographic Service Areas (CGSAs) created by the Commission's adoption of new rules and the concomitant amendment of all existing licenses in the *Second Report and Order*, 7 FCC Rcd 2449 (1992)[3] and (2) those areas outside the CGSA, but within the Metropolitan Statistical Area (MSA) or Rural Statistical Area (RSA) containing fewer than 50 square miles.[4] CECR asks that this stay be effective until the United States Court of Appeals for the District of Columbia Circuit disposes of CECR's pending petition for review of the *Memorandum Opinion and Order on Reconsideration* (*Reconsideration Order*) issued by the Commission in CC Docket No. 90-6, *Amendment of Part 22 of the Commission's Rules to Provide for Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules*, 8 FCC Rcd 1363 (1993)[5] which CECR filed on March 22, 1993.[6] For the reasons discussed below, we deny CECR's motion for stay.

DISCUSSION

2. CECR contends that staying the effectiveness of the *Order* is warranted and also argues that it has made the required demonstrations that: (1) it would be irreparably harmed if its motion is not granted; (2) it is likely to prevail on the merits of its appeal; (3) a stay would cause little, if any, harm to other interested parties; and (4) a stay would serve the public interest.[7] CECR has correctly stated the applicable test. The Commission will stay an action only in those cases where the movant has convincingly demonstrated that all four elements set forth in *Virginia Petroleum* and its progeny have been met. *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). CECR has not met this burden, however, particularly regarding irreparable injury, which is the gravamen of its motion.

3. CECR contends that unless the Commission stays the acceptance and granting of existing licensees' fill-in applications until the Court of Appeals has considered CECR's petition for review, neither the Commission nor the court may be able to provide any meaningful relief should the court grant CECR's petition for review of the *Reconsideration Order*.[8] According to CECR, the Commission is predisposed to shield licensees from substantial financial loss. Consequently, it claims that the Commission would accord a substantial preference to the licensees in any selection process employed to select licensees for the unserved areas lying outside the existing licensees' redefined CGSAs, leaving CECR and other prospective fill-in applicants with practically no chance of being selected to provide service in the unserved areas. CECR also seems to contend that because the costs of constructing fill-in facilities would be great, the court might even determine that requiring an incumbent to abandon its investment would be unacceptable and might uphold the Commission's decision on this ground.

4. CECR has not demonstrated irreparable injury.[9] If CECR is successful in court, any license grants that are inconsistent with the court's decision will be rescinded and

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[1] CECR describes itself as an *ad hoc* organization of cellular permittees/licensees, engineering firms, investment bankers, and industry consultants.

[2] CECR says that it has no objection to the licensees expanding their service areas provided they do so with their existing facilities and not with newly-constructed facilities in the disputed areas.

[3] In the *Second Report and Order* the Commission adopted rules to determine CGSAs by the use of a mathematical formula. It also modified the authorizations of existing cellular systems to redefine the boundaries of their CGSAs in accordance with the new standard. In addition, the *Second Report and Order* amended the Rules to allow licensees to expand their CGSAs within their markets during the five-year fill-in period without prior authorization.

[4] Section 22.924(a)(1) of the Commission's Rules, 47 C.F.R. § 22.924(a)(1), authorizes third parties to apply for unserved areas beyond CGSAs, provided the geographical coverage of each area is at least 50 contiguous square miles. *See First Report and Order and Memorandum Opinion and Order on Reconsideration* in CC Docket Nos. 90-6 and 85-388, 6 FCC Rcd 6185 (1991).

[5] We held, *inter alia*, in the *Reconsideration Order* that the Commission is authorized to modify the CGSAs of cellular licenses through a notice and comment rule making proceeding without an adjudicatory hearing.

[6] CECR's motion for stay is opposed by McCaw Cellular Communications, Inc. and Southwestern Bell Mobile Systems, Inc.

[7] *See Washington Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977) and *Virginia Petroleum Jobbers Association v. FPC*, 295 F.2d 921 (D.C. Cir. 1958).

[8] CECR states that in its petition, which was filed with the court of appeals on March 22, 1993, it seeks review of the *Order* on the grounds that it (1) violates the Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.*, and (2) is arbitrary, capricious, and an abuse of discretion.

[9] The cases cited by CECR are inapplicable as they related to

all timely applications will be included in a lottery. *See* 47 C.F.R. §§ 1.823, 22.916(c). CECR's suggestion that the Commission will use comparative hearings rather than lotteries or otherwise favor licensees who constructed under the new rule but subsequently had their licenses rescinded is unfounded and wholly speculative. In any licensing process following a court reversal, the prior rescinded license grant or the prior construction expenditures will have no impact. Consequently, CECR has failed to demonstrate that it would suffer irreparable harm as required for grant of a stay. *See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., supra.*

5. CECR has also failed to meet the other standards for a stay. For example, we believe that cellular licensees and the public would be disserved by delaying the introduction of service pending the outcome of CECR's petition for review, which may not be resolved for some time.

6. In sum, we find that CECR has not demonstrated that staying the effectiveness of the *Reconsideration Order* is warranted.

7. Accordingly, IT IS ORDERED THAT, the "Motion for Stay" filed by The Committee for Effective Cellular Rules IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

concerns that there could be irreversible harm to the environment if construction went forward. *See Lathan v. Volpe*, 455 F.2d 1111 (9th Cir. 1971); *Calvert Cliffs Coord. Comm. v. U.S. Atomic Energy Comm.*, 449 F.2d 1109 (D.C. Cir. 1971).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

HUGHES COMMUNICATIONS GALAXY, INC. File No. 23-DSS-P/LA-93

Application for Authority to Construct, Launch and Operate an Emergency Replacement Satellite

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: July 19, 1993; Released: July 28, 1993

By the Commission:

I. INTRODUCTION

1. Hughes Communications Galaxy, Inc. (Hughes) requests authority to construct, launch and operate its Galaxy I-R(S) emergency replacement satellite. Galaxy I-R(S) will substitute for Galaxy I-R, which was involved in a launch failure in August 1992. The Galaxy I-R(S) application was put on Public Notice[1] and no comments or oppositions were filed. For the reasons set forth below, we grant Hughes's application to construct, launch and operate its Galaxy I-R(S) emergency replacement satellite, subject to certain conditions described herein.

II. DISCUSSION

2. In January 1988, Hughes filed applications to construct, launch and operate three satellites in the 4/6 GHz frequency bands that would replace its existing Galaxy I, Galaxy II and Galaxy III satellites at the end of their useful lives. Hughes proposed to operate these replacement satellites from the same orbital locations occupied by their predecessors.[2] These applications for replacement satellites were unopposed.

3. The Commission granted Hughes authority to construct, launch and operate its Galaxy I-R satellite in November 1988, to replace Galaxy I at its end of useful life.[3] Galaxy I-R was constructed and launched in a timely fashion, but the August 1992 launch of Galaxy I-R failed. Hughes's Galaxy I-R satellite, originally scheduled to replace Galaxy I, was destroyed in that launch disaster. For reasons beyond Hughes's control, the United States Air Force destroyed Galaxy I-R because of a technical malfunction of the launch vehicle.

4. In October 1992, Hughes requested and was granted a waiver pursuant to Section 319(d) of the Communications Act, 47 U.S.C. § 319(d), to allow it to begin to construct Galaxy I-R(S).[4] As the end of useful life for Galaxy I is fast approaching, Hughes requests authority to construct, launch and operate an emergency replacement satellite to avoid disruption of service to its customers.

5. Galaxy I-R(S) will be technically and operationally indistinguishable from the previously authorized Galaxy I-R satellite. The transponder frequency plan, polarization plan, footprint, and power that were authorized for Galaxy I-R will be used on Galaxy I-R(S). Hughes's proposed emergency replacement satellite will carry 24 transponders, each with a bandwidth of 36 MHz and an output power of 16 watts. Galaxy I-R(S) will provide services to the 48 contiguous states, Alaska, Hawaii, Puerto Rico and the Virgin Islands at a maximum EIRP of 38.0 dBW. Further, Galaxy I-R(S) will be assigned to the same orbital location, 133^0 W.L., now assigned to Galaxy I.

6. The transponder transactions proposed by Hughes for Galaxy I-R(S) are also identical to those previously authorized for Galaxy I-R, and are consistent with the Commission's policy regarding transponder sales.[5] The Commission previously authorized Hughes to sell up to 24 of its Galaxy I-R transponders on a non-common carrier basis. Transponder sales authority for Galaxy I-R(S) will not increase the amount of total transponders available for sale beyond that amount which would have existed had the Galaxy I-R launch been successful. For this reason, we grant Hughes's transponder sales request.

7. Pursuant to Section 309 of the Communications Act, 47 U.S.C. § 309, we find that grant of the application for an emergency replacement satellite will serve the public interest, convenience and necessity. Hughes is legally, technically, financially and otherwise qualified to construct, launch and operate its proposed emergency replacement satellite pursuant to Part 25 of the Commission's rules, 47 C.F.R. § 25.101 *et seq.* In addition, grant of the application is consistent with the Commission's policy to approve emergency replacement satellites following a launch disaster.[6] Further, because the public interest considerations that justified the Commission's authorization of the Galaxy I-R satellite apply as well to its emergency replacement, a separate determination that an additional in-orbit satellite is in the public interest is not necessary.

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[1] Public Notice, Report No. DS-1278 (January 27, 1993).

[2] Galaxy I, II and III were originally assigned to the 134^0, 74^0 and 93.5^0 W.L. orbital locations, respectively. In our 1988 Orbit Assignment Order, 3 FCC Rcd 6972 (1988), we made an adjustment to the assignment for Galaxy I in order to implement the 1988 Trilateral Agreement with Canada and Mexico. The authorized location of Galaxy I-R was changed to 133^0 W.L. in order to reflect the arrangement with Canada and Mexico.

[3] Hughes Communications Galaxy, Inc., 3 FCC Rcd. 6989 (1988).

[4] *See* letter from Chief, Domestic Facilities Division, Common Carrier Bureau to James F. Rogers, Esq., (October 13, 1992).

[5] Domestic Fixed-Satellite Service Transponder Sales, 90 FCC 2d 1238 (1982), aff'd sum nom. Wold Communications, Inc. v. FCC, 735 F.2d 1465 (D.C. Cir. 1984). *See also* Martin Marietta Communications Systems, Inc., 51 Fed. Reg. 24223 (July 2, 1986).

[6] Licensing of Space Stations in the Domestic Fixed-Satellite Service, 54 Rad. Reg. 2d (P&F) 577 (1983) at note 99.

III. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED that Application File No. 23-DSS-P/LA-93 IS GRANTED, and Hughes Communications Galaxy, Inc. IS AUTHORIZED to construct, launch and operate its emergency replacement satellite, Galaxy I-R(S), in accordance with the terms, conditions and technical specifications set forth in its application.

9. IT IS FURTHER ORDERED that Hughes Communications Galaxy, Inc. SHALL COMPLY with all of the requirements of the 1988 Orbit Assignment Order, 3 FCC Rcd. 6972, as well as the relevant terms and conditions of all previous orders and authorizations concerning the operation of space stations. These requirements include the filing of semi-annual reports on the progress of space station construction and current satellite operational status and transponder loading, as described in the 1980 Orbit Assignment Order, 84 FCC 2d 584, 611-612 (1981) and the 1983 Domestic Fixed Satellite Licensing Order, 54 Rad. Reg. 2d (P&F) 577 (1983) at para. 91.

10. IT IS FURTHER ORDERED that, unless extended by the Commission for good cause shown, this authorization shall become null and void in the event the space station is not launched and successfully placed into operation by December 1994, in accordance with the technical parameters and terms and conditions of this authorization.

11. IT IS FURTHER ORDERED that the license term for the space station is ten years and will begin to run on the date the licensee certifies to the Commission that the satellite has been successfully placed into orbit and the operations fully conform to the terms and conditions of this authorization.

12. IT IS FURTHER ORDERED that Hughes Communications Galaxy, Inc. IS AUTHORIZED to sell 24 transponders on its 4/6 GHz band replacement satellite, Galaxy I-R(S), in accordance with Commission policies articulated in Domestic Fixed-Satellite Transponder Sales, 90 FCC 2d 1238 (1982), aff'd sub nom. Wold Communications, Inc. v. FCC, 735 F.2d 1465 (D.C. Cir. 1984).

13. IT IS FURTHER ORDERED that Hughes Communications Galaxy, Inc., as required by Section 25.202(c) of the Commission's rules, 47 C.F.R § 25.202(c), will prepare the necessary submissions to the International Telecommunication Union (ITU) for advance publication, international coordination and notification of the space station in accordance with the ITU Radio Regulations and for consultation in accordance with Article XIV of the INTELSAT Agreement within sixty days of release of this order.

14. Hughes Communications Galaxy, Inc. IS AFFORDED thirty days from the date of release of this memorandum opinion, order and authorization to decline this authorization as conditioned. Failure to respond within that period will constitute formal acceptance of the authorization as conditioned.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

CELLULAR, INC. File No. 00589-CL-TC-1-93
(Transferor)

and

PACIFIC TELECOM CELLULAR
OF WISCONSIN, INC.
(Transferee)

For Transfer of Control of
Eau Claire Cellular Telephone
Limited Partnership, Licensee
of Station KNKA673, in the
Domestic Public Cellular
Telecommunications Radio
Service on Frequency Block B,
in Market 232, Eau Claire,
Wisconsin MSA.

MEMORANDUM OPINION AND ORDER

Adopted: July 20, 1993; Released: July 28, 1993

By the Chief, Mobile Services Division:

I. INTRODUCTION

1. In this order, we address an application filed jointly by Cellular, Inc. (Cellular or transferor) and Pacific Telecom Cellular of Wisconsin, Inc. (PTCW or transferee) that seeks the Commission's consent to transfer control of Eau Claire Cellular Telephone Limited Partnership (Eau Claire Partnership or licensee). We also address a Petition to Deny and Supplement to Petition to Deny jointly filed by United States Cellular Investment Company of Eau Claire, Inc. (USCIC) and Chibardun Cellular Telephone Corporation (CCTC) (collectively Petitioners), and related other pleadings.[1] For the reasons discussed below, we deny the Petition to Deny and Supplement to Petition to Deny, and we grant the application.

II. BACKGROUND

2. The licensee is a partnership composed of four general partners and two limited partners. Each general partner holds an 11 percent equitable interest in the partnership. The general partners are North-West Cellular, Inc. (NWC), which is controlled by PTWC; Eau Claire Cellular, Inc., (ECCI), which is controlled by Cellular; CCTC, a petitioner; and Universal Cellular for Eau Claire MSA, Inc. (Universal). The two limited partners are ECCI and USCIC, the other petitioner. Their respective equitable interests in the licensee are 35.5 percent and 22.5 percent. Pursuant to the proposed transaction, an equity interest of 44.5 percent in the partnership will be acquired by PTCW through its purchase of all of ECCI's stock. When PTCW's effective equity interest is considered together with the 11 percent interest held by NWC, PTCW will effectively control general partners' interests totaling 22 percent and a limited partner's interest of 33.5 percent, resulting in a combined equity interest of 55.5 percent, which amounts to *de jure* control of Eau Claire Partnership.

III. DISCUSSION

3. Preliminarily, it should be noted that Section 310(d) of the Communications Act of 1934 (the Act) requires that the Commission find that the public interest, convenience, and necessity will be served by the transfer of control of a company holding a radio license. Subsumed therein is the requirement that we review, as may be appropriate, the citizenship, character, financial, technical, and other qualifications of the transferee applicant.[2] Our review of the subject application shows that PTCW has met these threshold qualification requirements.[3] We now turn our attention to the matters raised by the Petitioners.

4. Section 309(d) of the Act, implemented by Section 22.30 of the Commission's Rules, prescribes the standards for those filing formal petitions to deny.[4] The statute and our rules set out an analytical framework for reviewing petitions filed by interested parties.[5] This framework includes, *inter alia*, the requirement that allegations be specific[6] and concern matters over which the Commission has jurisdiction.[7] The Petitioners have failed to meet at least one of these criteria in each of their allegations.

5. The Petitioners submit that the application should be denied because the proposed transfer violates the partnership agreement through which they and Cellular are affiliated. The Petitioners allege that Cellular has failed to offer them the right to purchase Eau Claire Cellular, Inc. (ECI) stock or ECI's interest in the Eau Claire Partnership at the same price and terms offered to PTCW. The grant of the application before the contract rights of the Petitioners are

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[1] These include a Joint Opposition to Petition to Deny filed by Cellular and PTCW, a Reply to Opposition to Petition to Deny filed by the Petitioners, a Response to Supplement to Petition to Deny filed by Cellular and PTCW, a Joint Motion for Leave to Supplement the Record filed by Cellular and PTCW, two requests for non-disclosure filed by Cellular, Comments to Joint Motion for Leave to Supplement the Record filed by the Petitioners, a Motion for Leave to Supplement the Record filed by the Petitioners, and Comments on Motion for Leave to Supplement the Record filed by Cellular and PTCW.

[2] *Centel Corporation*, 6 FCC Rcd 1003, 1004-05 (1991); *see also* 47 U.S.C. §§ 308(b), 310(d).

[3] In the Common Carrier and Cable Television Relay Services, the transferor's qualifications are not included in the Commission's assessment of whether the transfer meets the public interest requirements. *See Cable-General, Inc.*, 87 FCC 2d 784 (1981). However, if it were demonstrated that the transferor's operation of the licensed facilities has been seriously deficient, the Commission may institute a revocation proceeding pursuant to Section 312 of the Communications Act. *See Morbro, Inc.*, 38 FCC 2d 1069, 1071 (1973); *see also* 47 U.S.C. § 312.

[4] 47 C.F.R. § 22.30.

[5] The Petitioners' standing as "interested parties" is not challenged.

[6] *See, e.g., Bilingual Bicultural Coalition v. FCC*, 595 F.2d 349, 358 (D.C. Cir. 1978).

[7] *See, e.g., Regents of the Univ. of Ga. v. Carroll*, 338 U.S. 586, 602 (1950).

resolved, the Petitioners claim, could result in management and operational changes in the licensee that would be contrary to the public interest. Therefore, they request that the Commission either deny the application or stay its action regarding the application until the contract dispute is resolved in court.[8] Subsequently, in their Supplement to Petition to Deny, the Petitioners contend that the Purchase Agreement between Cellular and PTCW's parent corporation, Pacific Telecom Cellular, Inc. (PTC), indicates that Cellular has agreed to vote its ECI partnership interest in accordance with PTC's direction prior to the Commission's action on the transfer of control application.[9] In view of this provision, the Petitioners submit that there may have been an unauthorized transfer of control. Consequently, they declare that the application should not be granted before this issue is resolved.

6. None of the Petitioners' arguments establishes cause to warrant further administrative action. The question of whether Cellular has violated the terms of the partnership agreement with the Petitioners is irrelevant to this proceeding since it concerns a matter over which the Commission lacks jurisdiction.[10] The alleged violation of the partnership agreement amounts to a contractual dispute between the Petitioners and Cellular and, thus, is a matter for resolution by state court or other local fora having jurisdiction to decide this issue.[11] Nor would there be any reason to withhold action on the transfer application. Granting the application simply authorizes the transfer of control of Eau Claire Partnership to take place. Furthermore, the forum having jurisdiction over the parties could enjoin the sale from going forward until it decides the respective rights of the parties.[12] In addition, the Petitioners' allegation is moot because on May 3, 1993, the Wisconsin state court granted a motion for summary judgment filed by the defendants and dismissed the Petitioners' complaint, holding that the right of first refusal had not been violated.[13] Consequently, this issue is no longer in controversy.

7. The Petitioners' second argument, that the transfer will result in injurious management and operation of the licensee, is equally unavailing. As explained previously, the Commission is not the proper forum for the injunctive relief that the Petitioners seek. Furthermore, even if it were, the Petitioners' allegation is unsupported by facts. Consequently, it fails to comply with the requirement of specificity established in Section 309 of the Act.[14]

8. Lastly, we have reviewed closely the entire record in this proceeding, including unredacted copies of the relevant portions of the Purchase Agreement, *i.e.*, Sections 4.7 and 4.9, the minutes of Eau Claire Partnership meetings held on March 18, 1993 and May 14, 1993, and a letter dated December 14, 1992, from Wayne Graham of Pacific Telecom, Inc. (PTI), all of which the Petitioners surmise indicate that Cellular has prematurely transferred control of the licensee to PTCW. We find no basis for the Petitioners' suspicion. Neither section of the Purchase Agreement, in any way, transfers control of the licensee.[15] The same is true of the partnership minutes. All of the participants at the meetings, including NWC, whose ultimate parent corporation is PTI, were referred to in the minutes by the names of their parents for the sake of brevity.[16] The use of this device has apparently confused the Petitioners and caused them to misinterpret the substance of the minutes. Finally, the Petitioners' reliance on the December 14th letter is even farther afield. In it PTI is providing notice pertaining to the exercise of a right of first refusal on an ownership interest as limited partner in an entirely different market held by a US West subsidiary. Thus, the letter is irrelevant to the matter before us. In sum, the Petitioners have failed to establish a *prima facie* case that there has been an unauthorized transfer of control of the licensee.

IV. CONCLUSION

9. Having reviewed the application and the pleadings filed in this matter, we conclude that PTCW possesses the legal, technical, financial, and other qualifications to assume control of Eau Claire Partnership and that grant of the subject application will serve the public interest, convenience, and necessity.

V. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED THAT, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the Petition to Deny and Supplement to Deny filed jointly by United States Cellular Investment Company of Eau Claire, Inc. and Chibardun Cellular Telephone Corporation ARE DENIED.

11. IT IS FURTHER ORDERED THAT the application of Cellular, Inc. and Pacific Telecom Cellular of Wisconsin, Inc. (File No. 00589-CL-TC-1-93) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

John Cimko
Chief, Mobile Services Division
Common Carrier Bureau

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[8] The Petitioners have commenced a law suit in Wisconsin state court to determine the contractual rights of the parties. *United States Cellular Investment Company of Eau Claire, Inc.* v. *Eau Claire Cellular, Inc.*, Case No. 92CV4978.

[9] A redacted version of the Purchase Agreement was acquired by the Petitioners in their attendant law suit.

[10] *See Charlotte L. Olive*, 6 FCC Rcd 5960 (1991).

[11] *See Metromedia Company*, 3 FCC Rcd 595 (1986).

[12] *See Radio Galion, Inc.*, 35 R.R.2d 1209, 1210 (1975).

[13] *See* "Joint Motion For Leave To Supplement The Record" filed by Cellular and PTCW on May 14, 1993.

[14] *See* 47 U.S.C. § 309(d) and 47 C.F.R. § 22.30.

[15] Cellular, pursuant to Sections 0.457(d) and 0.459 of the Commission's Rules, 47 C.F.R. §§ 0.457(d), 0.459, asks that the information it supplied at our request, as well as additional proprietary information it voluntarily supplied, be treated as confidential and withheld from public inspection.

[16] *See* declaration of Michael A. Fluharty and affidavits of Jeffery W. Edgerton, Jon A. Huard, and Jeffrey B. Bunke, Comments on Motion for Leave to Supplement the Record, filed jointly by Cellular and PTCW on June 9, 1993.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-140

In the Matter of

Amendment of Part 74 of the	RM-5416
Commission's Rules Concerning FM	RM-5472
Translator Stations	

MEMORANDUM OPINION AND ORDER

Adopted: June 28, 1993; Released: July 28, 1993

By the Commission:

INTRODUCTION

1. On November 8, 1990, the Commission adopted a *Report and Order* (*Report*), 5 FCC Rcd 7212 (1990), amending the rules governing the FM translator service. The Commission's action restructured the FM translator rules consistent with the intended purpose of providing supplementary service to areas in which direct reception of FM radio broadcast stations is unsatisfactory due to distance or intervening terrain barriers. Before the Commission are separate petitions for reconsideration filed by the National Association of Broadcasters (NAB), John S. La Tour (La Tour), the National Translator Association (NTA), Klimek Communications Corp. (Klimek), Ed Crook (Crook), and Doyle Brewer (Brewer).[1] By this *Memorandum Opinion and Order*, we affirm and further clarify the FM translator rules, including the revised standards for: ownership and financial support of translators; the definition of "major change" in translator coverage areas; maximum power output; and interference criteria for translators. We also adopt minor amendments in the grandfathering criteria and the technical aspects of local program origination.

BACKGROUND

2. FM translators are stations that receive the signals of FM radio broadcast stations and simultaneously retransmit those signals on another frequency.[2] In general, the signal of the FM radio broadcast station being rebroadcast[3] must be received directly over-the-air at the translator site.[4] FM translators were authorized in 1970 as a means of providing FM service to areas and populations that were unable to receive satisfactory FM signals due to distance and intervening terrain obstructions.[5] The Commission restricted FM translators to operating strictly on a secondary basis and limited their service, ownership, financial support, and program origination authority.[6]

3. In the *Report*, we tightened or clarified several rules after concluding that the proper role for FM translators remains as a secondary service supplementing the service of FM radio broadcast stations. We also modified several rules so that translators could better serve the public. The rule changes sought to ensure that the translator service does not adversely affect the operation of FM radio broadcast stations. First, the coverage contour of a translator providing fill-in service was defined to coincide with the coverage contour of the primary station for the respective station classes. With respect to service issues, we determined that an FM translator may not be licensed to a commercial FM broadcast station if the translator's coverage contour goes beyond the primary station's coverage contour. In "white area" situations, beyond the protected contour of any full-time aural service, we indicated that we would be favorably disposed toward requests for waivers of our rules to permit commercial primary station ownership. Similarly, we determined that commercial primary stations could financially support fill-in translators[7] both before and after the translator commences operation. We also concluded that commercial FM broadcast stations may not provide financial support beyond technical assistance to

[1] Dan Hendrix and FM Technology Associates, Inc. filed petitions for reconsideration after the 30-day statutory deadline. *See* 47 U.S.C. § 405, 47 CFR § 1.106(f). Therefore, the issues raised by these parties are not considered in this proceeding.

[2] Currently, there are approximately 1,901 FM translators on-the-air. Construction permits have been granted for another 390 translators.

The current rules also recognize FM booster stations that receive, amplify and retransmit signals on the same frequencies as the FM radio broadcast station. Booster stations are authorized only to the licensee of the primary station they rebroadcast and afford a means whereby the licensee of a primary station may provide service to areas at low signal strength within its primary service contour. *See* 47 CFR § 74.1231(h). We have revised the FM booster rules to authorize higher power FM boosters and to permit them to rebroadcast signals received by any distribution technology the licensee deems suitable. *See Report and Order* in MM Docket No. 87-13, 2 FCC Rcd 4625 (1987).

[3] An FM radio broadcast station whose signal is rebroadcast by an FM translator is referred to as the "primary station." *See* 47 CFR § 74.1201(d).

[4] The rules have been modified to permit licensees of noncommercial educational FM stations to use any distribution technology they deem suitable, subject to certain conditions, to transmit programming to their own translators operating on reserved channels. *See Report and Order* in MM Docket No. 86-112, 3 FCC Rcd 2196 (1988), *recon. denied in relevant part, Memorandum Opinion and Order* in MM Docket No. 86-112, FCC 89-216, 4 FCC Rcd 6459 (1989). Further, independently-owned FM translator stations that operate in the "fill-in" area of their NCE-FM primary stations may receive signals by using any terrestrial means. *See Second Report and Order* in MM Docket No. 86-112, 7 FCC Rcd 5546 (1992).

[5] *See Notice of Proposed Rule Making* in Docket No. 17159, 34 FR 761 (1969), *Report and Order* in Docket No. 17159, 20 Rad. Reg. 2d (P&F) 1538 (1970). *See also* 47 CFR § 74.1231(a).

[6] The FM translator rules are set forth at 47 CFR §§ 74.1201-74.1284.

[7] The *Report* distinguishes between a "fill-in" translator, whose predicted coverage contour is entirely contained within the primary station's coverage contour, and an "other area" translator, whose predicted coverage contour extends beyond the primary station's coverage contour.

"other area" FM translators; however, we indicated that we will favorably view waiver requests to allow financial support for translators in "white areas." Noncommercial educational FM (NCE-FM) translators are exempt from these ownership and financial support restrictions.

4. With respect to other service issues, we permitted all translators to use one or more announcements not to exceed a total of 30 seconds per hour in order to acknowledge and solicit funds for operating expenses. We allowed commercial fill-in translators to use any terrestrial means to obtain the primary station signals, with a favorable disposition toward waiver requests for similar permission entertained for "white area" translators. We clarified that licensees may operate multiple FM translators upon showing "need" as determined on technical grounds by the quality of signal received from the intended primary station or any operating translator. We also adopted procedures to resolve mutually exclusive applications. We defined a "major change" for FM translators as any change in output frequency (output channel), or any change or increase (but not decrease) in geographic area that increases the 1 mV/m coverage area by more than 10 percent of the previously authorized 1 mV/m coverage contour. We continued to exempt FM translators from our multiple ownership rules, and also to prohibit AM-FM cross-service translating.

5. Regarding technical issues, we decided to allow all FM translators to operate on any of the 80 commercial channels with the 20 reserved noncommercial educational channels remaining available for NCE-FM translator use. We adopted a maximum ERP standard of 250 watts at low antenna heights (HAAT), and stated that additional antenna height must be traded for reduced power, implemented by new criteria that limit permissible coverage distance. We indicated that we would be favorably disposed toward waiving this rule to permit higher power (up to 250 watts ERP at any HAAT) if applicants demonstrate that the service to a greater distance reaches only a "white area." In order to apply the waiver standard to NCE-FM translators, we decided to construe any area that is not served by a full-service noncommercial educational radio station as a "white area." We clarified the standards for antennas and adopted our proposed prohibited overlap criteria for predicted interference to FM and TV Channel 6 stations. We concluded that existing stations must comply with the new service rules within three years of the effective date of these new rules, and stated that we would entertain waiver requests where service to the public would be unduly lost as a result of compliance. We also "grandfathered" existing translators that do not comply with the new technical rules unless interference problems occur or the licensee of a grandfathered translator seeks to modify its facilities.

DISCUSSION

General Comments

6. *Petitions.* The petitioners discuss several general issues in connection with the new FM translator rules. In particular, NTA and Klimek believe that submissions to the record regarding the abuses of the ownership and fundraising limitations by FM translators are unsupported allegations for which the Commission has not made any findings of actual violations.[8] NTA also claims that the new rules concerning translator use in "white areas" are contrary to the Commission's pro-competitive policies and other precedents, observing that the Commission has concluded elsewhere that a rural area is "underserved" if it receives interference-free service from less than five full-time stations.[9]

7. Conversely, NAB argues that the Commission should promote FM radio service through "full-service," regularly authorized FM broadcast stations, and that the purpose of FM translators should be to provide radio service to unserved areas or areas where there is a gap in authorized service. It suggests further reforms in translator ownership requirements in order to ensure that FM radio stations are not subjected to unwarranted technical interference or to "unfair competition" by FM translator stations. NAB also contends that the rules should allow additional provision of radio service where genuinely desired by the public rather than by entrepreneurs alone. NTA asserts that NAB has not demonstrated that their members have been subject to "unwarranted technical interference" or "unfair competition," and that the Commission *Report* protects full-service rural stations from competition.

8. *Discussion.* As stated in the *Report*, we find that any enhancements to FM service are most efficiently provided by full-service broadcast stations. The prior rules allowed certain uses by FM translators that contributed to the potential for abuse and to the possible detriment of the FM radio broadcast service. We conclude that the new ownership and financial support limitations adopted in the *Report* will best serve the public interest by promoting incentives for primary station development.

9. NTA asserts that the decision contradicts other Commission precedents regarding the definition of "adequately served" and "underserved" areas. However, the FM translator service is designed to function on a secondary basis in order to supplement the service provided by FM radio broadcast stations. While we have defined "adequately served" and "underserved" areas differently in other Commission regulatory contexts, our definition of "white areas" for the purposes of FM translators is more relevant to the FM translator service's role of filling gaps caused by distance and terrain barriers. The full-service broadcast station concept of an "underserved" area considers a greater number of stations because such stations are our preferred means of achieving broad distribution of radio service. Furthermore, the definition of "underserved" referenced by NTA is one used to determine which of several competing proposals for stations would, on a comparative basis, better

[8] For a complete discussion of the alleged abuses by FM translators in the *Report*, *see* 5 FCC Rcd 7212, 7215, 7216 (1990).

[9] NTA generally cites "the line of cases applying Section 307(b) of the Communications Act." *See* NTA Petition for Reconsideration, January 9, 1991, at p.10, n.9. NTA also references the *Further Notice of Proposed Rule Making* in MM Docket No. 90-4, released December 31, 1990, where the Commission proposed requiring a number of local signals to constitute effective competition for local cable systems.

serve the public interest. Therefore, that definition has little direct relevance to the relationship between full-service and translator service. In addition, the number of entities necessary for establishing effective competition for cable services, as cited by NTA, is irrelevant to the standard applied in the aural medium. Therefore, we continue to believe that commercial primary stations should be able to own FM translators beyond the station's predicted 1 mV/m coverage contour only if the translator serves a "white area." Independent parties, of course, are permitted to establish FM translators to serve any area as desired.

Service Issues

Ownership restrictions

10. *Current Rules.* The new ownership rules allow commercial FM broadcast stations to own a translator only when the translator's coverage area is entirely within the primary station's coverage contour. The rules do not allow ownership of "other area" FM translators by any entity "interested in or connected with" the licensee of a primary station.[10] We stated that we would view favorably waiver requests to permit commercial primary station ownership of translators providing "other-area" coverage for "white areas."

11. *Petitions.* NAB supports our decision but requests that translator service to truly "white areas" should be allowed without requiring FM radio station licensees to seek a waiver. According to NAB's proposal, primary station ownership in "white areas" would be permitted until the area obtains service from an FM broadcast station. At that point, under NAB's proposal, a translator would be required to abide by the normal "other area" requirements. NAB claims that in "white" areas, there is no fear of unfair competition to full-service FM radio stations or any threat of abuse of the rules.

12. *Discussion.* We conclude that the record does not support NAB's contention that a "white-area" exception to our ownership rule would substantially improve public service in comparison to a waiver process. We find that the waiver process more appropriately addresses the unique needs of "white areas" by permitting the Commission to engage in thorough oversight of situations where primary stations continue to own "other area" FM translators. Therefore, where a licensee establishes that service is indeed unavailable in the absence of a translator, we will be favorably disposed toward requests for waivers of this rule to address these unique circumstances. We also wish to clarify that we will be especially reluctant to grant a request for authorization of an "other-area" translator unless the party requesting the authorization states affirmatively that the translator is not sought as part of a reciprocal arrangement with another primary station, whereby the primary stations seek translator authorizations in order to rebroadcast each other's signals. Such arrangements would present substantial potential for abuse and would undermine our new service rules.

Financial support

13. *Current Rule.* Under the new financial support rules, fill-in translators may be supported financially by the primary station before and after beginning operations. However, "other area" translators cannot receive support, either direct or indirect, from commercial primary stations or interested parties at any time except for technical assistance.[11] The Commission will favorably consider waiver requests for commercial FM primary station support of other area translators serving "white areas."

14. *Petitions.* La Tour states that the new financial support rules will eliminate many translator services by severely limiting sources of support.[12] He believes that FM translators offer many unique services to the public, including providing otherwise unavailable "narrow" formats, providing a variety of media viewpoints, helping small market radio stations, and creating efficient advertising options for smaller urban businesses. Additionally, La Tour and Klimek claim that translators do not harm other local FM services, stating that owners and management are responsible for the failure of AM and FM stations by failing to provide satisfactory formats and service to listeners.[13]

15. NTA asserts that the Commission action is tantamount to abolishing the translator service, as their members need some financial assistance from primary stations. NTA argues that it is impossible for the Commission to conclude that independent financial sources will be adequate. NTA observes that solicitations from area residents may cover authorization and construction costs, but ongoing translator expenses generate "free-rider" problems, and residents will become dissatisfied with having to pay for services that are free for urban neighbors.[14] NTA recommends allowing primary station funding up to a $200-per-month threshold, above which a demonstration of the underlying costs for additional operating and maintenance expenses would be required.

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[10] Interested and connected parties extend to group owners, corporate parents, shareholders, officers, directors, employees, general and limited partners, family members, and business associates. As stated in the *Report*, because of the potential for abuse, we intend this provision to be broader than our general attribution rules.

[11] Primary stations will be permitted to provide "technical assistance" to FM translators in other areas, to the extent of installing, repairing, or making adjustments to equipment to assure compliance with the terms of the translator station's construction permit or license. In this regard, technical assistance is excluded from the indirect support proscription in our rule.

[12] Doyle Brewer also believes that many FM translators will not survive without additional financial support.

[13] See Exhibit 2, La Tour petition, which lists 54 AM stations that have gone dark for financial reasons though no translators operate in the area. Also see Exhibit 4, La Tour petition, a statement from high power broadcasters attesting that there are no adverse affects to their stations from translators.

[14] Klimek and Crook argue that additional methods of obtaining funds for actual expenses, in addition to the current 30 seconds of solicitations and announcements, should be allowed due to the unreliable nature of independent donations. Crook also suggests that the 30-second announcements may divert funds from small high-power stations that offer advertising at greater rates.

16. NAB and London Bridge favor the new financial support restrictions, commenting that the public interest is furthered if full-service radio stations are not harmed by translators. They observe that the rules still allow technical assistance to FM translators in "other areas."[15]

17. *Discussion.* We affirm our decision to prohibit a commercial primary station from providing direct or indirect financial support to any FM translators serving "other areas," both before and after they commence operation, except for technical assistance. Also, we will maintain a favorable disposition toward requests for waivers of this rule to permit a commercial primary station to support any translator providing service to "white areas." We continue to believe that the revised financial support rule is necessary to ensure that translators owned by a commercial station seeking to increase its coverage are used only to provide FM service to areas and populations that are unable to receive satisfactory FM signals due to distance or intervening terrain barriers.

18. In the *Report*, the Commission dismissed La Tour's arguments favoring only limited constraints upon financial support for FM translators.[16] La Tour's petition for reconsideration presents no new arguments. As noted in the *Report*, we believe that an expanded translator service could provide disincentives for the establishment of broadcast stations, relative to translator facilities, since translators have no local service obligations and generally operate at significantly lower cost. While La Tour correctly notes that translators could provide small market stations with a means of distributing their signals in larger markets, and a means of distributing additional innovative programming services, we note that these goals are also attainable through acquisition of or initiation of service by full-service broadcast stations. Therefore, we affirm our prior determination that the new rules will help ensure that FM translators remain limited to a supplementary role so as not to discourage full-service radio broadcast station development of additional formats and service to the public.

19. We also reject NTA's proposal for a $200 per month limit on acceptable financial support combined with reporting requirements. NTA's proposal would create a substantial burden for both licensees and the Commission due to the additional oversight and review necessitated by such filings. In response to NTA's concern that listeners may not contribute funds despite benefiting from the translator's service, we emphasize that the new rules provide for waivers of the "grandfathering" period upon a showing by the licensee that the public would lose service as a result of compliance with the rules. NTA's alternative also overlooks the fundamental enforcement problem associated with a primary station's "indirect support" to FM translators. Given that many of the potential abuses by translators would arguably occur by primary stations providing support in the form of "indirect services", we conclude that the public is better served by the limitations established in the new rules. In addition, we reiterate that communities seeking additional service and formats will have the opportunity to fund FM translator service under the new rule through their independent charitable support.

20. We stated in the *Report* that "technical assistance" by primary stations will be excepted from the indirect financial support proscription.[17] We affirm this decision and clarify that "technical support" refers to actual services provided by the primary station's technical staff or compensation for the time and services provided by independent engineering personnel. Such support does not include the supply of equipment or direct funding for the translator's discretionary use. We also reiterate that technical assistance by the primary station should occur after the issuance of the translator's construction permit or license in order to meet expenses incurred by installing, repairing, or making adjustments to equipment.[18] We continue to believe that these maintenance expenses may become prohibitive given the limited financial resources of many FM translators, and that limited technical assistance by the primary station will enable translators to continue to provide valuable service to the public.

Fundraising by translators

21. *Current Rule.* The new fundraising rules permit FM translators to air one or more fundraising announcements or advertisements per hour totalling 30 seconds in length.

22. *Petitions.* NAB asserts that fundraising announcements should be restricted to "enhanced underwriting"-type messages on the grounds that full service stations should not be subjected to translator activities that detract from their local and public service operations.[19] NAB is further concerned that multiple announcements per hour will cause frequent interruptions in primary station programs and create unwarranted incentives for translator operators to behave as commercial broadcasters.[20] London Bridge supports NAB and objects that the new rules allow profit-making by translator licensees, particularly through incentives to advertisers provided by primary stations as "indirect support" to translators. Specifically, London Bridge suggests that the rules would allow a primary station to offer an advertiser a reduced rate for an advertisement on the primary station in return for providing financial support to the translator. In response, La Tour comments that 30-second fundraising

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[15] London Bridge expresses concern that the new rules permit primary stations to provide maintenance and repair service for translators. London Bridge states that as a result, the translator "entrepreneurs" who previously received monthly fees from primary stations for maintenance and repair may simply be disguised as salaried engineers under the new rules.

[16] *See* 5 FCC Rcd 7217 (1990) at para. 31.

[17] *See* 5 FCC Rcd 7217 (1990), n.36. We note that the attribution rules for the ownership of FM translators should preclude the potential abuses of "technical assistance" raised by London Bridge. *See* 47 CFR § 74.1232 (d).

[18] The amended rules are set forth in Appendix B.

[19] NAB also requests that the Commission reconsider its decision not to include in the new rules the guideline that translators "may not make fundraising announcements for the purpose of making a profit." We note that essentially the same standard was set forth in the *Guide to FM Translator Rules and Policies*, 55 RR 2d (P&F) 1248 (1984), and that this standard is superseded by the new rules. When existing translators become subject to the new rules in three years, such a requirement will become unnecessary. However, the *Report* retained the Policy Statement's guideline that prevents fundraising announcements for profit for three years, a period coinciding with the "grandfathering" period for the service rules.

[20] Arizona Broadcasters Association filed *ex parte* comments on April 8, 1991, which also advocate stronger content restrictions on the solicitation of funds by translator operators.

announcements each hour will not damage radio services, and indeed are too limited to provide a reliable source of funding to translator operators.

23. *Discussion.* We reaffirm the rule limiting on-air fundraising activities by FM translators to 30 seconds of announcements within an hour. We continue to believe that the 30-second period is an adequate opportunity for FM translators to acknowledge contributions as well as to solicit funds from their listeners as necessary. We also affirm our decision in the *Report* that the solicitations or announcements may be split during the hour. We continue to believe that it is unnecessarily restrictive to regulate how translators should allocate their 30 seconds of announcements within an hour.

24. We deny NAB's request that announcements should be restricted in form to "enhanced underwriting" messages. In order to encourage donations from independent sources, translators must be able to provide some information about their contributors. We find it unnecessary to limit the content of these brief announcements. Also, while the new rules no longer require FM translator licensees to operate non-profit facilities, the record before us does not indicate that translators will be able to earn substantial profits. In addition, we find that the scenario raised by London Bridge -- under which a primary station's advertisers could be enticed to provide financial support to a translator in return for reduced advertising rates -- would violate the "indirect support" prohibition.

Local program origination authority

25. *Current Rule.* In the *Report*, the Commission retained its limitation on local program origination to 30 seconds per hour for fundraising and acknowledgement of contributions.[21] Emergency warnings of danger are limited in time and frequency to that necessary to protect life and property. Translators owned by parties other than the primary station must obtain written consent for the rebroadcast of the FM radio broadcast station signals.[22] We also retained the rule that prohibits the retransmission on translators of signals other than those emanating from FM full-service or translator stations.[23]

26. *Petitions.* La Tour states that translators can provide innovative programming by retransmitting the aural portions of cable services on the FM dial (*i.e.*, C-Span, ESPN, CNN, and the Weather Channel). He believes that this would improve public safety while enhancing programming options on the FM band. Also, a network of translators could be set up to rebroadcast the audio portion of the Weather Channel up and down every interstate system in the country and could relay a warning message as soon as a hazardous situation is discovered. In opposition, NAB comments that program origination by FM translators goes against the basic, secondary role of FM translators and threatens the provision of issue-responsive programming by local, full-service stations. NAB argues that La Tour essentially recommends allowing FM translators to develop into a low power radio service.

27. *Discussion.* We reaffirm the rules prohibiting program origination by all translators, commercial and NCE-FM, with the exception of acknowledgements or solicitations of financial support as well as emergency warnings of danger.[24] In the *Report*, we emphasized that the proper role of FM translators is to provide secondary service to areas where direct reception of signals from FM broadcast stations is unsatisfactory due to distance or intervening terrain obstructions. We remain committed to providing FM radio broadcast service in a manner that promotes program diversity while enhancing the incentives for efficient full-service broadcast station development. Therefore, we intend to maintain the existing programming authority distinctions between FM broadcast stations and translator services.

28. We note that the rules concerning the permissible sources of input channels for FM translators are not intended to restrict programming content. Rather, where there is sufficient community interest, the rules permit translators to rebroadcast any programming broadcast by a primary FM station, thereby affording translators an opportunity to import programming formats otherwise unavailable. Thus, rebroadcasts of the aural portion of a TV or cable signal would be permitted if such a signal were first rebroadcast by a full-service FM station, but not solely by a translator. Once again, we believe that it is necessary to distinguish between the services provided by low cost translators and FM radio broadcast stations due to our preference to provide service through more efficient radio broadcast stations.

Signal delivery

29. *Current Rule.* The *Report* provides that fill-in translators of commercial primary stations may now use any terrestrial delivery means to obtain the signal from the primary station. "Other-area" translators, however, may only use off-air delivery, although we indicated that we will favorably consider waiver requests to permit signal delivery by any terrestrial means for translators serving "white areas."

30. *Petitions.* La Tour's petition for reconsideration argues that all translators should be permitted to use a dependable method of signal delivery so as to avoid the static found in over-the-air methods. It asserts that "other-area" translators are, by definition, located many miles from the primary station, such that even high gain antennas mounted high above the average terrain cannot overcome signal fades and interference. La Tour claims that if NCE-FM translators may use all forms of alternative signal delivery technologies to provide a higher quality signal, then commercial translators (since they use the same principles of reception and transmission) should have access to the same signal delivery technologies. Also, La Tour contends that translators located 70 to 80 miles away from the primary station need alternate signal delivery methods more than "fill-in" translators since they have a more difficult time receiving the signal.

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[21] 47 CFR § 74.1231(g).

[22] 47 CFR § 74.1284(b). 47 U.S.C. § 325(a).

[23] 47 CFR §§ 74.1231(b), 74.1284(c).

[24] Section 74.1231(f) of the rules specifies that a locally-originated signal be made automatically by means of a "time switch". *See* 47 CFR § 74.1231(f). On further consideration, we conclude that allowing alternate means of control is warranted in order to alleviate the possible inconveniences created by timing errors when translators must rely solely upon the automatic switches. Therefore, the Commission will allow translators to use any otherwise permissible automatic means of production when originating local signals. We will exclude manual control of the signal in order to facilitate compliance with the 30-second time limitation for fundraising announcements.

31. *Discussion.* We believe that any further extension of signal delivery alternatives for "other area" translators would be inconsistent with the secondary role of FM translators in the commercial context. The *Report* extended permission for fill-in translators to use alternative signal delivery on the grounds that other terrestrial means would conceivably be necessary to circumvent the terrain or other barriers that prevent otherwise expected over-the-air delivery of an FM signal to the translator.[25] As for "other-area" translators, however, there is no similar expectation, especially at large distances, such as 70 to 80 miles from the station. We continue to believe that, to the extent that translator service is desirable beyond a station's predicted service contour, the over-the-air signal will generally be suitable for rebroadcast, although certain white-area situations may warrant a waiver to permit alternative signal delivery methods. Moreover, we believe that the signal delivery provisions in the *Report* will eliminate disincentives for service by full-service radio broadcast stations in instances where sufficient community interest exists for additional services, but where the existence of "other area" translators financed by primary stations would work to limit the economic viability of such stations. Furthermore, we do not believe that allowing alternative signal delivery for "other area" NCE translators owned by their primary stations requires that we do the same for commercial translators. We have long recognized that NCE-FM and commercial licensees participate in fundamentally different broadcast services. Therefore, we continue to believe that we are not required to apply the same standards for signal delivery to NCE-FM and commercial licensees.

Definition of major change

32. *Current Rule.* A "major change" is defined in the *Report* as occurring due to any change in output frequency (output channel), or any change or increase (but not decrease) in 1 mV/m coverage area of more than 10 percent of the previously authorized coverage contour.

33. *Petitions.* NAB urges that where a translator changes the primary station being rebroadcast, that change should be subject to full public scrutiny as a "major change." NAB claims that translators often significantly shift their technical facilities shortly after authorization, and also frequently change the primary station received. Furthermore, NAB believes that "other area" translators, under our new rules, will seek to substitute a primary station whose protected contour is sufficiently proximate that it would qualify as a "fill-in" translator, and that such changes should be reviewed to ensure that the change does, in fact, result in "fill-in" service. La Tour comments that if a translator wants to change primary stations so that the translator's coverage is completely within the primary coverage area of the new primary station, such changes are consistent with the new rules and should not be deemed a "major change."

34. La Tour argues that the 10-percent threshold is very low and will lead to abusive petitions. He claims that conditions prompting a tower change will trigger the major change process which could drag out for years in costly administrative proceedings or, at best, a minimum of 90 days. La Tour also argues that potential interference from changes in the coverage area greater than 10% should not be a concern, because if any change in an operating facility causes interference to a regularly used signal, the Commission can suspend the operation of the translator.

35. *Discussion.* We continue to believe that our definition for "major change" appropriately covers those changes in technical parameters and coverage areas that are significant. The standard also allows licensees sufficient flexibility to make minor technical and facility changes that cause negligible changes in signal patterns. In addition, we believe that changes in coverage areas in excess of 10% could have significant public interest implications. For example, FM translators have an obligation to protect audiences beyond the defined service areas of full service FM stations, and such information is not available in an FM translator application itself. The greater the change in the translator's coverage area, the higher the risk that the audience of a full service station will be affected. Accordingly, changes in coverage area in excess of 10% are appropriately considered "major changes."

36. We also reject NAB's request to include a change in input channel or primary station as a major change criterion. A change in the input channel does not alter a translator's technical parameters because the coverage area, output channel, and potential for creating interference remain identical. While a change in the output frequency is a significant technical change, the input channel is essentially a programming content decision that is not significant with respect to the public interest. Furthermore, to the extent that a translator changes its primary station in a manner that does not clearly comply with our rules, we note that the matter is more appropriately a question for our enforcement function rather than the application process.

Technical Issues

Maximum power output

37. *Current Rule.* As decided in the *Report*, an FM translator's maximum power output will be limited to 250 watts ERP. In addition, the coverage contour of fill-in translators may not go beyond the coverage contour of the primary station. "Other-area" translators will be restricted to power and height combinations that yield a distance to the translator's coverage contour that does not exceed 7 km in Zone I-A[26] and east of the Mississippi River, and 13 km elsewhere. The Commission will be favorably disposed toward waiving this rule to permit higher power up to 250 watts at any antenna height if the service to a greater distance reaches only a "white area."[27]

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[25] A letter from E.W. Bundy questions the signal delivery authority distinctions between NCE-FM and commercial translators as well as the three year transition as part of the decision in MM Docket No. 86-112. (*See Memorandum Opinion and Order*, in MM Docket No. 86-112, 4 FCC Rcd 6459, (1989)). Bundy claims that these decisions deny local public radio stations the protection retained for local commercial stations. However, this issue is not germane to MM Docket No. 88-140. Mr. Bundy's letter has been entered into the record of MM Docket No. 86-112.

[26] Zone I-A consists of Puerto Rico, the Virgin Islands, and the portion of California located south of the fortieth parallel. *See* 47 CFR § 73.205(b).

[27] For NCE-FM translator applications, white areas are defined

38. *Petitions.* La Tour, Brewer, and Crook state that the ERP standard will produce a weak signal for the listening public without justification by the Commission. They argue that with the newly adopted interference standards, even 1 kW power would not cause interference, and that the Commission should adopt the 1 kW ERP limit with primary coverage at 16 km as proposed in the *NPRM*. Similarly, Klimek states that under the new maximum power output rule it is impossible for translators to be effective in states with widely varying terrain. Klimek offers an example that, in western states, translators are located on mountain tops in order to avoid terrain barriers that would prevent their signal from reaching the communities they wish to serve. NTA adds that the new rules will require multiple translators to serve rural populations that do not conform to a 16 km radius.

39. NAB supports the Commission's ruling on maximum power output and comments that the requests for a higher ERP limit and less restrictive contour distances are contrary to the secondary nature of FM translators. Accordingly, NAB advocates ERP standards which are established at the minimum necessary level for signal coverage.

40. *Discussion.* As stated in the *Report*, the Commission's new maximum power limits recognized that translators must deliver broadcast signals to small and distant service areas with the minimum necessary power. However, we observed that many translators were already constructed more than 16 km from the area of service and utilized power output in excess of 250 watts. As a result, the 250 watt maximum ERP standard and the grandfathering provisions discussed below will promote the fundamental purpose of FM translators while also accommodating most existing authorized facilities. Although we originally proposed a 1 kW ERP limit with a distance to the coverage contour not to exceed 16 km, we observed that most licensees are already in compliance with the lower adopted power standard as well as the 7 km and 13 km distances to coverage contours. For these reasons, the Commission affirms its decision not to expand the maximum power limits so as not to contradict the intended purpose of the FM translator service. We continue to believe that service similar to large or high-power translator stations should be provided by full-service stations. Nonetheless, we emphasize that existing facilities that are not in compliance with the new maximum power standards are grandfathered until actual interference occurs or licensees propose to make changes in their facilities.[28]

Interference criteria

41. *Current Rule.* In the *Report*, we adopted a contour overlap method for predicting interference with translator applicants permitted to show that interference will in fact not occur. We will not grant an application if an objecting party provides convincing evidence that the proposed translator station would be likely to interfere with the reception of a regularly received off-the-air existing service, even if there is no predicted overlap. This revised method for predicting interference incorporates greater processing flexibility through population and terrain exceptions. Complaints of actual interference must be resolved by the FM translator.

42. *Petitions.* NAB states that the Commission should require FM translator applicants to include exhibits to show compliance with the interference standards because: (1) the exhibits will initiate recognition of the new rules and interference standards and thus lead to better compliance; and (2) the new rules allow applicants to determine the appropriate level of supporting analysis which shifts the burden of demonstrating compliance or non-compliance to the FCC and existing broadcasters. NAB also observes that the new availability of 80 commercial channels for translator operations, as well as a 250 watt maximum ERP, will increase the importance of predicted interference protection standards in order to prevent actual instances of interference. La Tour comments that even if a translator operator could disguise interference at the application level, the actual operations of an interfering translator would be difficult to conceal, and that the "comprehensive exhibits" advocated by NAB will greatly increase the cost of translator applications.

43. *Discussion.* We reject NAB's suggestion to require applicants to include exhibits demonstrating compliance with our interference limits because it would create an unnecessary burden on applicants. We find that NAB's proposal is unnecessary because we will continue to perform interference studies to determine whether applicants comply with the new rules. We also recognize that due to their limited financial and technical means, many FM translator licensees may require the flexibility of determining compliance with the interference rules without detailed analyses as part of their applications. Due to the secondary nature of the service, we reiterate that FM translator licensees must adjust their operations following instances of actual interference.[29]

Other Matters

Grandfathering criteria for existing translators

44. *Current Rules.* Licensees authorized prior to June 1, 1991[30] may continue to operate without conforming with the new technical rules provided that no actual interference occurs and the translator does not propose to modify its facilities.[31] If actual interference develops or the

as "any area that is not served by a full-service public radio station." *See* 5 FCC Rcd 7227 (1990). By using the term "public radio," we did not intend to exclude from the relevant stations those noncommercial stations not affiliated with the National Public Radio or American Public Radio networks.

[28] *See* para. 48, *infra*.

[29] We also note that Section 74.1237 of the rules regarding antenna location is amended to reflect that the limitation applies only to translators owned by commercial FM radio stations in order to remain consistent with the ownership and financial support restrictions. *See* 5 FCC Rcd 7215 (1990)).

[30] The amended rules governing the FM translator service became effective on June 1, 1991. *See Order*, 47 FR 23024 (May 22, 1991). Applications pending as of June 1, 1991 can be granted only under the terms of the new service and technical requirements and must be amended to conform with the new rules. *See Report*, 5 FCC Rcd 7233 (1991). We allowed pending applicants 60 days to file amendments demonstrating compliance with the new rules. We now believe, however, that this 60-day period was too restrictive, and we will allow pending applicants to file conforming amendments upon notification by the processing staff. Applicants must use a revised FCC Form 349.

[31] *See* 47 CFR § 74.1203 for "actual" interference standards governing FM translators with respect to the direct reception of off-the-air signals by the public.

translator seeks to modify facilities, translators must satisfy the new technical standards concerning interference protection for FM broadcast and TV channel 6 stations, as well as the new power limitations.[32] With respect to the service rules, compliance by existing FM translators will be required in three years, and requests for waivers will be considered if licensees show that the public would unduly lose service as a result of compliance with the new rules.

45. *Petitions.* NAB, supported by ABA and London Bridge, requests a one-year grandfathering period for compliance with the new service rules, starting from the December 10, 1990 publication of the *Report* in the *Federal Register*. They contend that the three-year grandfathering provision, as well as a possible waiver, will lead to further abuses by translators which may eliminate many local radio stations. NAB also claims that translators should be able to adapt to the new rules within a few months. La Tour opposes a reduced grandfathering period since the Commission noted that rapid compliance with the new rules could cause a "withdrawal" of FM translator service from areas currently served, "a result contrary to the public interest."

46. *Discussion.* In adopting the *Report*'s three-year grandfathering provision for compliance with the service rules, we emphasized the limited resources of many FM translator licensees and the burden that could result if we were to require accelerated compliance with the new financial support standard. We therefore deny NAB's request to reduce the grandfathering period for the service rules based upon our desire to promote an orderly transition to the new rules and to avoid an unnecessary disruption of service to the public. We also conclude that an indefinite grandfathering period would undermine the effectiveness of the new rules in returning the FM translator service to its original secondary role. Instead, we continue to believe that the *Report*'s provision for extended waivers will adequately prevent the public from unduly losing service in unique circumstances.

47. We wish to clarify that "other-area" translators that are temporarily "grandfathered" with respect to the ownership and financial support provisions of the new rules will not be required to comply with the new service rules for the remainder of the three-year period if the translator changes its primary station. We believe that a change in the primary station will reflect the preferences of local audiences in the community without altering the technical aspects of a translator's operation, and should ensure that translators constructed based on expectations formed under our prior rules will have sufficient time to adjust their operations.

48. We also amend the grandfathering provision concerning the technical rules by specifying that FM translators authorized prior to the effective date of the rules must comply with the full scope of the technical requirements when they implement a "major change" modification or if they cause interference. Such FM translators seeking "minor changes" may continue to operate without complying with the technical rules provided that they satisfy the standards for actual interference.[33] We have affirmed that translators proposing modifications that would not change or increase the 1 mV/m coverage area by more than 10 percent are not subject to the "major change" review process. Similarly, we believe that it would be unduly onerous to require compliance with all the technical rules in instances where modifications do not significantly increase the translator's coverage area.[34]

IF Separation Requirements

49. We are amending Section 74.1204(g) of our rules to state standards for the treatment of FM translators based on ERP, so that they are consistent with the minimum permissible power level for Class A FM stations, and the treatment of other secondary FM services.[35] Translators operating with less than 100 watts ERP will be treated as Class D stations and will not be subject to IF separation requirements.[36] We believe that adjusting this requirement to this extent, given the totality of the safeguards adopted in this proceeding, is consistent with our fundamental concern with preventing interference, and we emphasize that the secondary nature of the FM translator service will require correction of any actual interference.

Directional Antennas

50. The *Report* adopted a contour protection method for protecting existing translator licensees against potential interference. In order to implement this approach, we are entering the technical parameters of each FM translator station into the Commission's data base. We have found that many licensees and permittees have inadequate information currently on file for our use. Accordingly, we are requesting by letter that such licensees furnish data necessary to implement the *Report*. In order to ensure that a licensee's failure to provide the requested information does not unduly hamper the functioning of our licensing process, we are, on our own motion, amending Section 74.1235 to establish specific mileage contours consistent with a translator station's power for those licensees that fail to submit the requested data. We note that this procedure is similar to that followed in updating our data bases for low-power television and TV translators,[37] and we believe that it will enable us to effectively implement changes in our rules that affect existing translator licensees. We also do not believe that public comment would serve a useful purpose because this action is a minor and non-controversial process to facilitate our efforts to gather information. However, we recognize that licensees may fail to submit the requested data and later conclude that the hypothetical values applied for their facility are unacceptable. In such instances, licensees may submit corrected figures for our use in protecting translators against potential interference.

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[32] *See* 47 CFR §§ 74.1204(j), 74.1205(d), and 74.1235(j).

[33] *See* revised Sections 74.1204 (j), 74.1205 (d), and 74.1235 (j) in Appendix B.

[34] In this regard, we also correct the text of the *Report*, which states in paragraph 142 that FM translators causing interference or proposing to modify facilities must comply with only the predicted interference standards in Section 74.1204, rather than Sections 74.1204, 74.1205, and 74.1235 of the rules.

[35] *See Order*, FCC 91-317, 6 FCC Rcd 6060 (1991), reconsideration pending.

[36] *See* 47 CFR § 74.1204 (g).

[37] *See, Memorandum Opinion and Order* in BC Docket No. 78-253, 53 RR 2d 1267, 1280 (1983).

TV Channel 6 Interference

51. In the *Report*, we adopted contour overlap standards to protect TV Channel 6 operations from FM translator operations. These standards were generally consistent with the NCE-FM broadcast station rules. However, Section 73.525(a) of the NCE-FM broadcast station rules permits NCE-FM broadcast applicants whose stations would potentially affect TV Channel 6 broadcast operations to file written agreements with each relevant TV Channel 6 broadcast station concurring with the proposed facilities. The new rule for translators lacked such a provision but we find no reason to omit a similar provision from the translator rules. On our own motion, we will add a provision to Section 74.1205 of the rules to indicate that we will accept FM translator applications that are accompanied by written agreements with all relevant TV Channel 6 broadcast station licensees or permittees.

CONCLUSION

52. By this *Memorandum Opinion and Order*, we have affirmed and further clarified the FM translator rules, including the revised standards for: ownership and financial support of translators; the definition of "major change" in translator coverage areas; and maximum power output. We have found that an expanded FM translator service could potentially redistribute revenues away from FM radio broadcast stations and limit the overall level of service to the public. We have amended aspects of the rules in order to facilitate the technical operation of FM translators. We have also denied NAB's petition for partial reconsideration seeking to tighten several rules, including a reduction of the grandfathering provision for service requirements to one year. We continue to believe that sufficient evidence for more stringent compliance standards is lacking and we desire to avoid an unnecessary loss of service to the public. Conversely, we believe that our decisions in the *Report* will allow for an orderly transition to the new rules while returning the FM translator service to its intended supplementary role.

PROCEDURAL MATTERS

53. Pursuant to the Regulatory Flexibility Act of 1980, the Commission included a final analysis in the *Report* detailing (i) the need for and purpose of the rules, (ii) the summary of issues raised by public comment in response to the initial regulatory flexibility analysis, Commission assessment, and changes made as a result, and (iii) significant alternatives considered and rejected. No substantive changes have occurred pertaining to the final analysis as a result of the petitions for reconsideration.

54. Accordingly, IT IS ORDERED that the Petitions for Reconsideration filed by the National Association of Broadcasters, the National Translator Association, Ed Crook, Klimek Communications Corporation; John S. La Tour, J and J Broadcasting, and Power du Pree Broadcasting Corporation; and Doyle Brewer ARE DENIED.

55. IT IS FURTHER ORDERED THAT pursuant to the authority contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended, Part 74 of the Commission's rules and regulations ARE AMENDED as set forth in Appendix B below, EFFECTIVE **30 days after publication in Federal Register.**

56. Further information on this proceeding may be obtained by contacting Alan Schneider, Mass Media Bureau, (202) 634-6307.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

List of Petitioners and Responses

Petitioners

1. National Translator Association (NTA)
2. Ed Crook
3. Klimek Communications Corporation
4. National Association of Broadcasters (NAB)
5. John S. La Tour, J & J Broadcasting, and Power du Pree Broadcasting Corp.
6. Doyle Brewer

Late-filed Petitioners

1. Dan Hendrix
2. FM technology Associates

Oppositions

1. Klimek Communications Corporation
2. John S. La Tour, J & J Broadcasting, and Power du Pree Broadcasting Corp.
3. London Bridge Broadcasting
4. NAB

Reply to Oppositions

1. NAB
2. NTA

APPENDIX B

Rule Changes

Title 47 CFR Part 74 is amended as follows:

PART 74 - Experimental, Auxiliary, and Special Broadcast and Other Program Distributional Services

1. The authority citation for Part 74 continues to read as follows:

Authority: 47 U.S.C. 154 and 303

2. Section 74.1204 is amended by revising paragraphs (g) and (j) to read as follows:

§ 74.1204 Protection of FM broadcast stations and FM translators.

* * * * *

(g) An application for an FM translator or an FM booster station that is 53 or 54 channels removed from an FM radio broadcast station will not be accepted for filing if it fails to meet the required separation distances set out in Section 73.207 of this chapter. For purposes of determining compliance with Section 73.207 of this chapter, translator stations will be treated as Class A stations and booster stations will be treated the same as their FM radio broadcast station equivalents. FM radio broadcast station equivalents will be determined in accordance with Sections 73.210 and 73.211 of this chapter, based on the booster station's ERP and HAAT. Provided, however, that FM translator stations and booster stations operating with less than 100 watts ERP will be treated as class D stations and will not be subject to intermediate frequency separation requirements.

* * * * *

(j) FM translator stations authorized prior to June 1, 1991 with facilities that do not comply with the predicted interference protection provisions of this section, may continue to operate, *provided* that operation is in conformance with § 74.1203 regarding actual interference. Applications for major changes in FM translator stations must specify facilities that comply with the provisions of this section.

3. Section 74.1205 is amended by adding an introductory paragraph and revising paragraph (d) to read as follows:

§ 74.1205 Protection of Channel 6 TV broadcast stations.

The provisions of this section apply to all applications for construction permits for new or modified facilities for a noncommercial educational FM translator station on Channels 201-220, unless the application is accompanied by a written agreement between the NCE-FM translator applicant and each affected TV Channel 6 broadcast station licensee or permittee concurring with the proposed NCE-FM translator facility.

* * * * *

(d) FM translator stations authorized prior to June 1, 1991 with facilities that do not comply with the predicted interference protection provisions of this section, may continue to operate, *provided* that operation is in conformance with § 74.1203 regarding actual interference. Applications for major changes in FM translator stations must specify facilities that comply with the provisions of this section.

4. Section 74.1231 is amended by revising paragraph (f) to read as follows:

§ 74.1231 Purpose and permissible service

* * * * *

(f) A locally generated radio frequency signal similar to that of an FM broadcast station and modulated with aural information may be connected to the input terminals of an FM translator for the purpose of transmitting voice announcements. The radio frequency signals shall be on the same channel as the normally used off-the-air signal being rebroadcast. Connection of the locally generated signals shall be made by any automatic means when transmitting originations concerning financial support. The connections for emergency transmissions may be made manually. The apparatus used to generate the local signal that is used to modulate the FM translator must be capable of producing an aural signal which will provide acceptable reception on FM receivers designed for the transmission standards employed by FM broadcast stations.

* * * * *

5. Section 74.1232 is amended by adding two sentences to paragraph (d), three sentences to paragraph (e) and an accompanying Note to paragraph (e) to read as follows:

§ 74.1232 Eligibility and licensing requirements.

* * * * *

(d) * * * An FM translator station in operation prior to June 1, 1991, which is owned by a commercial FM radio broadcast station and whose coverage contour extends beyond the protected contour of the primary station, may continue to be owned by a commercial FM radio broadcast station until June 1, 1994. Thereafter, any such FM translator station must be owned by independent parties.

(e) * * * Such an FM translator station may, however, receive technical assistance from the primary station to the extent of installing or repairing equipment or making adjustments to equipment to assure compliance with the terms of the translator station's construction permit and license. FM translator stations in operation prior to June 1, 1991 may continue to receive contributions or support from a commercial FM radio broadcast station for the operation and maintenance of the translator station until June 1, 1994. Thereafter, any such FM translator station shall be subject to the prohibitions on support contained in this section.

Note: "Technical assistance" refers to actual services provided by the primary station's technical staff or compensation for the time and services provided by independent engineering personnel. Conversely, such support must not include the supply of equipment or direct funding for the translator's discretionary use. "Technical assistance" must occur after the issuance of the translator's construction permit or license in order to meet expenses incurred by installing, repairing, or making adjustments to equipment.

* * * * *

6. Section 74.1235 is amended by adding a note to paragraph (i) and revising paragraph (j) to read as follows:

§ 74.1235 Power limitations and antenna systems.

* * * * *

(i) * * *

Note: Existing licensees and permittees that do not furnish data sufficient to calculate the contours in conformance with § 74.1204 will be assigned protected contours having the following radii:

Up to 10 watts -- 1 mile (1.6 km) from transmitter site

Up to 100 watts -- 2 miles (3.2 km) from transmitter site

Up to 250 watts -- 4 miles (6.5 km) from transmitter site

(j) FM translator stations authorized prior to June 1, 1991, with facilities that do not comply with the ERP limitation of paragraph (a) or (b) of this section, as appropriate, may continue to operate, *provided* that operation is in conformance with § 74.1203 regarding interference. Applications for major changes in FM translator stations must specify facilities that comply with paragraph (a) or (b) of this section, as appropriate.

7. Section 74.1237 is amended by revising paragraph (d) to read as follows:

§ 74.1237 Antenna location.

* * * * *

(d) The transmitting antenna of an FM booster station shall be located within the protected contour of its primary station, subject to Note, Section 74.1231 (h). The transmitting antenna of a commonly owned commercial FM translator station shall be located within the protected contour of its commercial primary FM station.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-639

In re Applications of

TEXAS EDUCATIONAL BROADCASTING CO-OPERATIVE, INC.
Hornsby, Texas — File No. BPED-880401MG

THE UNIVERSITY OF TEXAS AT AUSTIN (TEXAS STUDENT PUBLICATIONS)
Austin, Texas — File No. BPED-880722MA

For Construction Permit for
New Noncommercial Educational
FM Station, Channel 219A

MEMORANDUM OPINION AND ORDER

Adopted: July 21, 1993; Released: July 29, 1993

By the Review Board: MARINO (Chairman), BLUMENTHAL, and GREENE.

1. In a prior *Memorandum Opinion and Order*, 7 FCC Rcd 7525 (Rev. Bd. 1992), the Board considered the exceptions to the *Initial Decision* of Administrative Law Judge Edward Luton.[1] Therein we noted the many uncertainties that had long plagued the noncommercial comparative criteria,[2] a condition expressly recognized in the Commission's *Reexamination of the Policy Statement on Comparative Broadcast Hearings*, 7 FCC Rcd 2664, 2669 (1992).

2. Adverting to the incremental policy complications cited by the Commission in cases such as *Real Life Educational Foundation of Baton Rouge, Inc.*, 6 FCC Rcd 2577 (Rev. Bd. 1991), in its *Reexamination*, *see* 7 FCC Rcd at 2669,[3] we strongly implored the instant combatants to regard the model reflected in *Maricopa County Community College District*, 7 FCC Rcd 859 (Rev. Bd. 1992), where we had also urged an amicable settlement between the contending educational entities,[4] and we requested our current applicants to explore alternative resolutions and report reasonably promptly on their progress. *See* 7 FCC Rcd at 7526-27.[5]

3. Consistent with the representations of the parties in their pleading of February 12, 1993, *see Order*, *supra* note 5, the Board has before it a Joint Request For Approval of Share-Time Agreement, filed June 28, 1993,[6] which in pertinent part provides[7]:

> The attached Agreement provides that Broadcasting [Texas Educational Broadcasting Co-Operative, Inc.] will operate on FM Channel 219A between the hours of 9:00 a.m.-7:00 p.m., Monday through Friday, and 9:00 a.m.-10:00 p.m., Saturday and Sunday; the University will operate on the frequency between the hours of 7:00 p.m.-9:00 a.m., Monday through Friday, and 10:00 p.m.-9:00 a.m., Saturday and Sunday. This Agreement thereby eliminates the competition for Channel 219A, conserves Commission resources and facilitates the early institution of new noncommercial FM broadcast service at Austin, Texas and the surrounding service area which includes Hornsby, Texas.

4. As in *Maricopa County*, the agreement, if and as effectuated, would remove the mutual exclusivity between the parties, speed the initiation of a new noncommercial service in Texas, and is otherwise consistent with noncommercial precedent. *See New York University*, 19 FCC 2d 358 (Rev. Bd. 1969). The Mass Media Bureau supports the agreement.

5. ACCORDINGLY, IT IS ORDERED, That the Joint Request For Approval of Share-Time Agreement filed June 28, 1993, by Texas Educational Broadcasting Co-Operative, Inc. and The University of Texas at Austin, IS GRANTED, and that the attached agreement IS APPROVED.

6. IT IS FURTHER ORDERED, That the applications of Texas Educational Broadcasting Co-Operative, Inc. (File No. BPED-880401MG) and The University of Texas at Austin (File No. BPED-880722MA) for authority to construct a new noncommercial educational FM station on Channel 219A at Hornsby and Austin, Texas, ARE GRANTED, Subject to their share-time agreement on file

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[1] 7 FCC Rcd 4069 (ALJ 1992).

[2] In *Black Television Workshop of Santa Rosa*, 65 RR 2d 34, 35-36 (Rev. Bd. 1984) (*delayed printing*), former Board Member Jerold L. Jacobs lamented that our noncommercial comparative criteria had become "vague," "amorphous" and effectively "meaningless."

[3] Although the Commission's *Reexamination* notice, citing the Board's decision in *Real Life*, stated that "[u]pon reflection, it appears that ... mak[ing] rational choices among noncommercial applicants [is] difficult, if not impossible," and tentatively concluded that the current "vague standard" for noncommercial applicant selection "should be eliminated," 7 FCC Rcd at 2669, the Commission recently denied review of the Board's *Real Life* decision without further discussion of the inherent vagaries. *Real Life*, 8 FCC Rcd 2675 (1993)(Comm'n).

[4] *See* 5 FCC Rcd 7614 (Rev. Bd. 1990).

[5] By *Order*, 8 FCC Rcd 1281 (Rev. Bd. 1993), we extended the reporting period at the mutual request of the parties.

[6] *Erratum*, filed July 2, 1993.

[7] Agreement at 1. The Agreement goes on to provide (*id.*, at 2):

> As set forth in the Agreement, the University will construct transmission facilities as proposed in its application and will lease, for a period of five years, those transmission facilities to Broadcasting for its broadcast service; accordingly, approval of the Agreement is contingent upon Broadcasting amending its application to specify the same transmitter site and transmission facilities proposed by the University in its application.

with the Commission; and Further Subject to the condition that Texas Educational Broadcasting Co-Operative, Inc. file an amendment specifying the transmitter and transmission facilities proposed by The University of Texas at Austin in accordance with footnote 7, *supra*, and the approval of the Mass Media Bureau to that amendment.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ACCEL, Inc. NAL Acct. No. 215BM0008
Alexandria, Virginia

Liability for Monetary Forfeiture

ORDER

Adopted: July 20, 1993; Released: July 28, 1993

Field Operations Bureau:

I. INTRODUCTION

1. The Bureau has before it a Petition for Reconsideration filed by ACCEL, Inc. (Petitioner) pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, requesting reconsideration of the July 17, 1992, Forfeiture Order issued by the Baltimore field office which found Petitioner liable for a monetary forfeiture in the amount of $7,000 for violating Section 302 of the Communications Act of 1934 as amended, 47 U.S.C.§ 302 (the Act), and Section 2.925 of the Rules, 47 C.F.R. § 2.925. The violation resulted from Accel's display and offer for sale of ten (10) different models of personal computers, all lacking the required FCC identification labels. As explained below, we are reducing the amount of the forfeiture.

2. The appropriate amount of the forfeiture is $5,600.

II. BACKGROUND

3. On February 20, 1992, FCC inspectors from the Baltimore field office visited Petitioner's place of business located at 4810 Beauregard St., Suite 103, Alexandria, Virginia, 22312, where the investigator observed that Petitioner was exhibiting ten (10) different models of personal computers, all lacking the required FCC identifying label and proof of FCC certification.[1] The FCC investigator requested, and was subsequently provided, proof of certification. On June 19, 1992, the Baltimore office issued a Notice of Apparent Liability (NAL) to ACCEL for violating the requirements of Section 302 of the Act and Section 2.925 of the Rules. These provisions establish the requirement that all radio frequency devices must have affixed the authorized FCC identification number before being offered for sale or lease.

4. ACCEL's June 30, 1992, response to the NAL contended that the company only sold equipment which was in compliance with all FCC requirements. ACCEL noted that the location visited by the FCC inspector was no longer a retail store, and that any agreement to sell equipment to the FCC inspector was only because of ACCEL's policy of not turning away any customers.

5. Since ACCEL's answer was not responsive to the lack-of-labeling issue, the Baltimore office issued a Forfeiture Order on July 17, 1992, finding ACCEL liable for a $7,000 monetary forfeiture ($700 for each of the ten uncertified models) for violation of the Section 2.925 labeling requirements. ACCEL is now petitioning for reconsideration of this Forfeiture Order. In its Petition, ACCEL argues that the location visited by the FCC inspector was not a retail facility, but only meant for "resellers".

III. DISCUSSION AND CONCLUSION

6. Section 2.925 requires that all FCC authorized devices, must have a label which includes an FCC identifier, reflecting that the device has been authorized by the FCC. 47 C.F.R. § 2.925, 2.926 and 15.19. ACCEL has not provided any information controverting or denying the inspector's finding that the equipment being sold was not labeled. ACCEL's argument that the store in question was geared toward "resellers" is inapposite to the issue of its liability for the labeling violation. The labeling requirement hinges on the class or type of radiofrequency equipment at issue, in this case Class B personal computers, and not just to whom the equipment was being offered for sale.[2] *See* 47 C.F.R. § 15.3. We have, however, taken into consideration Petitioner's argument that it has always complied with the Commission's certification requirements. Because Petitioner has no prior history of violations, the amount of the forfeiture has been reduced.

7. For the reasons stated above, we are reducing the amount of the monetary forfeitures assessed against Petitioner in NAL Acct. No. 215BM0008 to $5,600. In determining the amount of forfeiture, the Commissions policy regarding forfeiture adjustments, *see Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *modified in part on reconsideration*, 7 FCC Rcd 5339 (1992), *petition for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992)(*Policy Statement*), was taken into consideration. No further adjustments appear warranted.

IV. ORDERING CLAUSES

8. IT IS ORDERED that pursuant to Section 503(b) of the Communications Act of 1934 and Section 1.106 of the FCC's rules, that the relief sought in the Petition for Reconsideration is DENIED. 47 C.F.R. § 1.106.

9. IT IS FURTHER ORDERED that ACCEL, Inc. shall submit payment of the $5,600 monetary forfeitures within 30 days of the receipt of this letter. Payment may be by

[1] As listed in the Notice of Apparent Liability, these models included: the Infinity 386-33 desk top, Infinity 386-25 desk top, Infinity 386SX-16 desk top, Infinity 286 desk top, Infinity 386-25 tower, NOBEL 286-12 desk top, NOBEL 386SX-25, Infinity 386 tower, Infinity 486-33 tower and Infinity 486-20 tower.

[2] We note that even if liability could be avoided by proof that the personal computers were not for sale to the general public, at the time of inspection the computers were being offered for sale to the general public, as evidenced by the company's policy of not turning any customer away. In any event, the copies of advertisements submitted by ACCEL as proof that the facility was open primarily to resellers are all dated after the February 20, 1992 violation date, and would, therefore, not be sufficent to support ACCEL's argument.

check or money order payable to the Federal Communications Commission. Please place NAL number 215BM0008 on the remittance and send it to:

Federal Communications Commission

Post Office Box 73482

Chicago, Illinois 60673-7482

10. IT IS FURTHER ORDERED that a copy of this Order shall be sent certified mail, return receipt requested, to Accel, Inc., 5655-D General Washington Drive, Alexandria, Virginia, 22312.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	File Nos. 16280-CF-P-92,
Order to Show Cause	16250-CF-P-92, and
to Michiana Metronet, Inc.	53045-CM-P-92
for Point-to-Point station WLN896	
at Fort Wayne, Indiana and	
Point-to-Point station WLK941 at	
Columbia City, Indiana	

MEMORANDUM OPINION AND ORDER

Adopted: July 19, 1993 **Released: July 29, 1993**

By the Chief, Domestic Facilities Division:

1. The Domestic Facilities Division, on delegated authority, issued an Order to Show Cause, *Michiana Metronet, Inc.*, 7 FCC Rcd 1001 (Dom. Fac. Div. 1992), in response to a motion filed by James A. Simon (Simon), licensee for Multipoint Distribution Service (MDS) station WHD358 on channel 2A at Ft. Wayne, Indiana. This order directed Michiana Metronet, Inc. (Michiana), licensee of common carrier point-to-point station WLN896, at Ft. Wayne, Indiana, and licensee of common carrier point-to-point station WLK941, at Columbia City, Indiana, to show cause why its license for station WLN896 should not be modified, at the expense of Simon, to specify operation at frequency 2178 MHz, with horizontal polarization, directed to Columbia City from the Hilgas site, and to specify, at the expense of Simon, use of a Mark Antenna Products Model MHP-21AH96D (left-handed feed) antenna, and why its license for station WLK941 should not be modified, at the expense of Simon, to specify operation at frequency 2128 MHz, with horizontal polarization, directed to the Hilgas site. This order also specifically encouraged Michiana and Simon to cooperate to accommodate these changes. Simon requested that his license be modified to add two megahertz to his existing license to authorize an MDS Channel 2 station.[1]

2. Subsequently, Michiana filed two modification applications and Simon filed a modification application. These modification applications stated that the two licensees had agreed to a modification plan in response to the show cause order. Michiana's modification application for its point-to-point microwave station WLN896 proposed a change of frequency to 2178 MHz, with horizontal polarization, and use of a specified Anixter Mark transmitting antenna. Michiana's modification application for its point-to-point microwave station WLK941 proposed a change of frequency to 2128 MHz, with horizontal polarization.[2] Simon's modification application proposed a change of frequency from Channel 2A to Channel 2.[3]

3. Based on the information before us, we believe the public interest would be served by the proposed station modifications. *See Second Report and Order, Wireless Cable Order*, 6 FCC Rcd 6792 (1991); *Order on Reconsideration, Wireless Cable Order*, 6 FCC Rcd 6764 (1991); *Further Notice of Proposed Rulemaking, Wireless Cable Order*, 5 FCC Rcd 6472 (1990); *Report and Order, Wireless Cable Order*, 5 FCC Rcd 6410 (1990)("This result should enhance the viability of wireless cable service and its stature as a competitive force in the multichannel video delivery marketplace." *Id.* at 6411.); *Notice of Proposed Rulemaking, Wireless Cable Order*, 5 FCC Rcd 971 (1990); *MMDS Allocation Order*, 94 F.C.C.2d 1203, 1228 (1983). Simon has provided sufficient evidence, pursuant to 47 C.F.R. Sec. 21.901(c), that no harmful interference will occur to any authorized point-to-point facility in the 2160-2162 MHz band.

4. Accordingly, IT IS ORDERED, pursuant to Section 316(a) of the Communications Act, as amended, that the license of point-to-point microwave station WLN896 IS MODIFIED: (1) to delete use of frequency 2162.00 MHz, with vertical polarization, from the Hilgas site to Columbia City, Indiana, (2) to specify use of frequency 2178.00 MHz, with horizontal polarization, from the Hilgas site to Columbia City, and (3) to replace the antenna at the Hilgas site with an Anixter Mark transmitting antenna, Model No. MHP-21AH96D (with a left hand feed). IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act, as amended, that the license of point-to-point microwave station WLK941 IS MODIFIED: (1) to delete use of frequency 2112.00 MHz, with vertical polarization, from Columbia City to the Hilgas site, and (2) to specify use of frequency 2128.00 MHz, with horizontal polarization, from Columbia City to the Hilgas site. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act, as amended, that the license of MDS station WHD358 at Ft. Wayne, Indiana IS MODIFIED to specify use of Channel 2, at 2156-2162 MHz, and a waiver is hereby granted of the location requirements for an MDS Channel 2 station at 47 C.F.R. Sec. 21.901(c).[4] Each of these modifications is made subject to the following conditions:

> (a) Nothing contained herein shall be construed to authorize any change in the stations' authorizations, including a change in transmitter location, except as specified in the three modification applications (File Nos. 16280-CF-P-92, 16250-CF-P-92, and 53045-CM-

[1] Authorization of MDS Channel 2 would allow the accumulation of an additional channel for video entertainment programming to be distributed by the local wireless cable operator. MDS channel 2A is only four megahertz of spectrum. Six megahertz of spectrum currently is necessary to provide an MDS video signal, together with its associated audio signal. MDS channel 2 is six megahertz of spectrum.

[2] Both modification applications were filed April 22, 1992. Application File No. 16280-CF-P-92 was assigned to the application for station WLN896. Application File No. 16250-CF-P-92 was assigned to the application for station WLK941. The applications appeared on public notice July 22, 1992 and were granted March 19, 1993.

[3] Application File No. 53045-CM-MP-92 was assigned to Simon's modification application. Public notice of Simon's Channel 2 proposal was made April 18, 1991. *Public Notice*, Report No. 1843, Mimeo No. 12684 (April 18, 1991).

[4] The earlier modification application filed by Simon, File No. 51079-CM-P-90, is hereby dismissed as moot.

MP-92), as supplemented, and the deletion of frequencies as specified herein. Any other changes require prior authorization after the submission of another modification application, FCC Form 494.

(b) Within five (5) days of the construction completion date specified on the authorizations of Michiana Metronet, a certification of completion of construction (FCC Form 494A) must be filed, together with a filing fee of $155, for each point-to-point microwave station, and within five days of the construction completion date on the authorization of James A. Simon, a certification of completion of construction must be filed, together with a filing fee of $455.

(c) The modifications specified in this order shall be effective the day after each specified certification of completion of construction is filed PROVIDED that the certifications are filed in a condition which is correct, complete and complies with Commission rules, and are accompanied by the appropriate filing fees.

5. IT IS FURTHER ORDERED that, pursuant to 47 C.F.R. Sec. 1.87(i), a copy of this *Memorandum Opinion and Order* shall be sent by Certified Mail, Return Receipt Requested, to the following:

Michiana Metronet, Inc.	James A. Simon
421 Fernhill Avenue	1911 Production Road
Ft. Wayne, IN 46808	Ft. Wayne, IN 46815

6. This order is issued pursuant to Sections 0.291 and 1.87 of the Commission's Rules, 47 C.F.R. Secs. 0.291 and 1.87, and is effective on its release date.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-350

In re Application of

ABACUS BROADCASTING CORP. File No. BRH-900530A2

For Renewal of License of
Station KJQN-FM, 95.5 MHz,
Ogden, Utah

Appearances

Henry E. Crawford on behalf of Abacus Broadcasting Corp. and *Larry A. Miller* and *James W. Shook* on behalf of the Chief, Mass Media Bureau.

DECISION

Adopted: June 10, 1993; Released: July 30, 1993

By the Review Board: MARINO (Chairman) and GREENE; Board BLUMENTHAL issuing a Separate Statement.

Board Member GREENE:

1. Before the Review Board is the *Initial Decision* of Administrative Law Judge Edward J. Kuhlmann, 7 FCC Rcd 6004 (1992), which granted Abacus Broadcasting Corp. a short-term renewal of its license for KJQN-FM, Ogden, Utah, for a period of two years from the release of the *Initial Decision* and assessed a forfeiture penalty of ten thousand dollars against Abacus. Abacus has excepted to this *Initial Decision*, and the Commission's Mass Media Bureau has supported Abacus' request for a full-term renewal without a forfeiture. After carefully reviewing the record in this proceeding, the Board is affirming the short-term renewal and assessing a forfeiture of five thousand dollars.

2. The instant proceeding began as a comparative renewal proceeding involving Abacus and the subsequently-dismissed application of Rees Broadcasting, Inc. for the same Ogden FM channel.[1] In preparing for the comparative hearing, Abacus filed a "Threshold Showing" seeking permission to show that its proposal would have substantially greater area and population coverage than the Rees proposal. It based its argument on a construction permit authorizing Station KJQN-FM to move to a site on Promontory Point from its Little Mountain site, which Rees had proposed, and it supported the argument with an engineering report showing the superior coverage expected from the authorized Promontory Point site. However, because Abacus failed to disclose in the Threshold Showing that it did not actually plan to use the Promontory Point site specified in the Showing, the ALJ added the following issues:

> 1. To determine whether Abacus lacked candor with respect to its "Threshold Showing," filed January 9, 1992.
>
> 2. To determine whether Abacus abused the processes of the Commission with respect to its "Threshold Showing," filed January 9, 1992.
>
> 3. To determine, in light of the evidence on issues 1 and 2, whether Abacus is basically qualified to remain a Commission licensee and/or whether Abacus, pursuant to § 1.80 should be assessed a forfeiture to the maximum amount permissible, for reasons given in the memorandum (FCC 92M-308, released March 11, 1992) and in consideration of §§ 1.17, and 73.4280.
>
> 4. To determine in light of the evidence adduced pursuant to the foregoing issues, whether Abacus Broadcasting Corp.'s application should be granted.

Id. at 6004.

3. The ALJ resolved the abuse of process issue favorably to Abacus but concluded that "[t]he behavior of Abacus. . . exhibits a lack of candor." *Id.* at 6008 ¶ 33. In doing so he rejected Abacus' arguments that the problem arose from an inadvertent mistake of counsel, Dan Alpert, that it had a technically comparable site nearby, and that Abacus President Garrett W. Haston did not catch the mistake after the Showing had been filed because of his reading disability. *Id.* at 6007-08. The ALJ concluded instead that Haston had approved the filing of a showing to improve its comparative status in the case, that Abacus did not have a new site when it filed the Showing, and that "Haston was fully aware that Abacus did not have a site on Promontory Point when the claim was made that it did." *Id.* at 6008 ¶ 32. Although the ALJ made no specific finding of an intent to deceive, he concluded that the falsehood in the Threshold Showing was motivated by an attempt to gain a comparative advantage because Abacus was not eligible for a decisional renewal expectancy, having taken control of KJQN-FM after the license period expired. He made adverse demeanor findings regarding both Haston, whom he accused of being willing to remember only what would serve his explanation, *id.* at 6008 ¶ ¶ 32, 35, 6009 n.2, and Alpert, whose explanation of the error he found "illogical and unbelievable under the circumstances presented here," including his legal experience and involvement in the extension of time requests filed by Abacus. *Id.* at 6008 ¶ 30. The ALJ rejected the argument that the inaccurate information resulted from counsel's mistake for the applicant had the ultimate burden "to insure that what was represented to the Commission was honest and reliable." *Id.* at ¶ 35. Thus, he concluded at ¶ 33 that Abacus' behavior "exhibits a lack of candor" and the "actions of its president and principal owner, Garrett Haston, involve concealment, evasion, and other failures to be fully informative," the definition of a lack of candor in the *Character Policy*

[1] Rees Broadcasting dismissed its application a few weeks before written cases were due. 7 FCC Rcd at 6004 ¶ 1.

Statement, 102 FCC 2d 1179, 1196 (1986) (subsequent history omitted). The ALJ did not disqualify Abacus, however. Instead, he exercised the Commission's broad discretion to choose remedies and sanctions by granting a short term renewal and imposing a forfeiture (for a violation of § 1.17) pursuant to *Standards for Assessing Forfeitures*, 6 FCC Rcd 4695, 4697 (1991), *recon. denied*, 7 FCC Rcd 5339 (1992). He explained:

> Abacus has exhibited a serious breach of trust. However, unlike the licensee who exhibits such behavior throughout the license term, Abacus' behavior has taken place in the last two years after the end of the license term and shortly after Abacus took control of the station. Because Abacus has only recently assumed control of KJQN, it is believed that it should not be denied a license but that its recent behavior makes a full license term unwarranted if the Commission is to insure that Abacus is fully qualified.

7 FCC Rcd at 6009 ¶ 37.

4. The ALJ focused on whether the Threshold Showing itself resulted from a lack of candor regarding Abacus' transmitter site, a conclusion he drew because he found that Abacus' explanation about having already selected a new site was insufficiently supported and Haston's testimony about it was not credible. We have looked at the question in two parts: 1) whether Abacus lacked candor in specifying a rejected site in the Threshold Showing; and 2) whether Abacus lacked candor in its later explanation of why the site specified in the Showing was merely a mistake. We have concluded from our review of the record and the *Initial Decision* that Abacus did not intentionally deceive the Commission but, instead, violated section 1.17 by presenting incomplete information that was material to analyzing its Threshold Showing and its subsequent explanation. We have also concluded that it failed to exercise the responsibility for information filed on its behalf that we expect of our licensees.

BACKGROUND

5. The history of the effort to move Station KJQN-FM to Promontory Point is complex, but because it is important to understanding the context of the Threshold Showing and Abacus' explanation of it, we will recount it here. The effort to move KJQN-FM to Promontory Point began because of signal problems from the authorized Little Mountain site almost as soon as the construction permit was granted to Michelle A. Haston, Garrett Haston's wife, in the late 1970's. Abacus Exh. 1 at 5. Sam Chournos, who owned much of the land on Promontory Point, was willing to allow radio towers, but the Commission rejected the permittee's 1980 application because of a short-spacing problem. *Id.* at 5-6. The station was constructed at the originally authorized site and merged with a local AM station in 1983, making Utah Broadcasting Corp., the licensee, a subsidiary of Sherman-Greenleigh-Sanchez Broadcasting of Utah, Inc. (SGS) and SGS President Thomas V. Greenleigh its general manager.[2] *Id.* at 2. Shortly after the merger, in December 1983, SGS applied to upgrade the FM station to full Class C status and move to Promontory Point to the KRGO-FM tower owned by Gene Guthrie on land owned by Chournos (the Guthrie site),[3] but the application was not granted until January 22, 1988, after the short-spacing problem had been resolved. *Id.* at 6; Joint Stipulation at 2.

6. While the upgrade application was pending at the Commission, the Hastons began their efforts to reacquire Station KJQN-FM and also buy the AM station. Exercising rights under the merger agreement, they entered into an asset purchase agreement on December 28, 1987, and on February 26, 1988, an application to assign the station from Utah Broadcasting to Abacus was filed. Abacus Exh. 1 at 2-3; Joint Stipulation at 2. This sale did not go smoothly. Utah Broadcasting received a higher offer and withdrew the assignment application in April 1988. Abacus Exh. 1 at 2; Joint Stipulation at 2-3. Abacus matched the offer and was awarded specific performance by a Commercial Arbitration Panel in June 1989. In August 1989 Utah Broadcasting and Abacus again filed an assignment application, which was granted in October. In the meantime, in September, Utah filed a civil suit to overturn the arbitration award. It needed more money for its creditors than it would realize under its agreement with Abacus, so continued looking for another buyer. Abacus Exh. 1, App. D at 8, 11-12. In May 1990, Utah Broadcasting filed its renewal application, and in September Rees filed its competing application.[4] On October 5, 1990, the Webster County District Court in Utah ordered that possession and the assets of KJQN-FM be transferred to Abacus. Joint Stipulation at 4. Abacus took over immediately, but closing on the assets was deferred. In late December 1990 or early January 1991, before the parties closed, SGS filed for voluntary bankruptcy under Chapter 7; Utah Broadcasting followed suit in early February. *Id.*; Abacus Exh. 1 at 3-4. In June 1991 the SGS/Utah Broadcasting Trustee in Bankruptcy filed a complaint against the Hastons and Abacus, seeking a return of the KJQN-FM assets. Joint Stipulation at 4-5. Because negotiations about the price were continuing, Haston did not appreciate the risk to the station until he sought advice from a bankruptcy expert on August 19, 1991. Abacus Exh. 1 at 9-10. Haston finally reached a settlement with the Bankruptcy Trustee in December 1991, which the Bankruptcy Court approved on January 2, 1992, and confirmed with court orders issued March 12 and 17, 1992. *Id.* at 11.

7. When the initial modification permit for the Guthrie site was about to expire in July 1989, Utah Broadcasting applied for an extension, explaining that a second station was now using the KRGO-FM tower but that Guthrie had agreed to sell KRGO-FM to someone who promised to build a new tower sufficient for all three stations. Joint Exh. 2. The extension was granted. On June 14, 1990 Utah Broadcasting again sought an extension of the construction permit. Joint Stipulation at 3; Joint Exh. 3 at 2. Greenleigh, who filed the request, explained that Guthrie's proposed sale had been denied by the Commission, that

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[2] Michelle Haston retained 30.45%; Garrett Haston, 1.05%. Mr. Haston also became a member of the SGS board of directors. Joint Stipulation at 1.

[3] Guthrie was the licensee of KRGO-FM.

[4] Official notice taken of Commission records.

Guthrie could not afford to build a new tower because he was bankrupt, and that Utah Broadcasting would shortly file for a minor change in the construction permit to use another site owned by Sam Chournos 0.3 km NNE of the present site (the Chournos site). Abacus Exh. 3, App. B. This extension was approved on July 23, 1990, with an expiration date of January 23, 1991. Joint Stipulation at 3-4. Shortly after Abacus finally took over the station on October 5, 1990, Abacus' engineer discussed the site move with Greenleigh, Abacus Exh. 3, reviewed the technical facilities, and made a shadowing study at Haston's request. Abacus Exh. 5 at 1, but did not follow-through with the Promontory Point site. Joint Exh. 4. However, in November, Abacus ordered a new transmitter, making cash deposits totalling $15,850 by the end of the year. Abacus Exh. 1 at 6.

8. Haston signed an application to again extend the construction permit on January 14, 1991, and Abacus counsel Dan Alpert filed it on January 22, 1991. In it Haston explained:

> It was after the transfer date that we discovered that [Utah Broadcasting President] Greenleigh never followed through and submitted the promised minor change to the FCC for a new site at Promontory Point.
>
> Since this time we have begun engineering studies to determine the absolute best location and site for KJQN-FM on Promontory Point. By early spring of 1991 we will be able to visit all the site options on Promontory and choose the site. It is at that time we would be ready to submit a minor change application to modify the present site that is called for in KJQN-FM, CP BPH-900614JC. We would also like the FCC to know that we have purchased a 25 KW transmitter for this new site upgrade and we will take delivery on this transmitter in early March of 1991.

Joint Exh. 5 at 3. On July 2, 1991, Dan Alpert responded to a staff inquiry about the status of Abacus' construction plans, explaining:

> Negotiations had been entered into for a new transmitter site atop Promontory Point, which is controlled by the Utah Gas Co. During the final phase of negotiations, however, the parties were unable to reach agreement on an equitable rental fee. Thus, Abacus currently is in the process of attempting to acquire an alternative site. It is expected that this process will take an additional sixty days.

Joint Exh. 6. The Utah Gas site was adjacent to the Guthrie site and was also on land owned by Chournos. Haston then met with the bankruptcy expert on August 19, and sometime after that formed a "mental reservation" about the upgrade. Abacus Exh. 1 at 10-11; Tr. 98. He unsuccessfully sought a refund of his deposit for the transmitter on August 28, 1991.

9. In the meantime, the comparative renewal proceeding was moving forward. Greenleigh, who was a creditor of Utah Broadcasting as well as its president, called Alpert on January 8, 1992, the afternoon before any motions to enlarge issues were due. Greenleigh questioned why KJQN-FM was not moving to full Class C operation since it held a construction permit to do so. Abacus Exh. 2 at 4, Tr. 79. Alpert found in his office files a copy of the construction permit authorizing the move to the Guthrie site on Promontory Point. He then called Haston to see whether Haston still planned to move to Promontory Point and would want to file with the ALJ a threshold showing demonstrating KJQN-FM's superior coverage from there. Abacus Exh. 1 at 12, Exh. 2 at 5. Alpert had already checked with a local engineering firm about the feasibility of preparing such a showing in time for filing by the next day, but Haston was concerned about the cost and wanted to find another engineering firm that could meet the deadline at a more reasonable fee. Tr. 173-74. Haston and Alpert held conference calls with two engineers "to see if they could see what Dan [Alpert] wanted done." Abacus Exh. 2 at 6, Tr. 174, 177, but only Alpert worked with the chosen engineer on the showing. Tr. 177; Abacus Exh. 2 at 7. Alpert sent the engineer by telecopier the engineering section of the SGS construction permit application. Abacus Exh. 2 at 7. Alpert prepared the Threshold Showing, attached the engineering report which used the coordinates from the Guthrie site, and attached a copy of that construction permit. He sent Haston a copy *after* it had been filed and Haston, who has a reading disability, says he did not read it or have it read to him. Abacus Exh. 1 at 13, Exh. 2 at 3. Because the Threshold Showing appeared to be inconsistent with the representations about needing a new site in the extension of time requests, the Bureau successfully sought the issues added by the ALJ.

DISCUSSION

10. *Threshold Showing.* The *sine qua non* of a lack of candor is fraudulent intent. *See Leflore Broadcasting Co., Inc. v. FCC*, 636 F.2d 454, 461 (D.C. Cir. 1980); *Character Policy Statement*, 102 FCC 2d at 1196; *Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 (1983), *recon. dismissed*, FCC 83I-43, released Apr. 20, 1983. We agree with Abacus and the Bureau that the record does not support a finding of intentional deception in the Threshold Showing, although the Showing was clearly misleading. In reaching this conclusion, we have considered that the idea to inject KJQN-FM's Class C construction permit into this proceeding came from Greenleigh, not from Haston or any other Abacus principal. The driving force behind the Threshold Showing was Alpert, who brought the idea to Haston after hurriedly determining that a showing could feasibly be filed by the deadline the next day. According to Alpert as well as Haston, the only discussion between them about the site was Alpert's imprecise question as to whether Haston still planned to move to Promontory Point and Haston's short answer in the affirmative. Tr. 173-75 (Haston testimony); Abacus Exh. 2 at 6-7, Tr. 241, 242 (Alpert testimony). Haston was concerned about costs so participated in selecting the engineer to do the necessary report on coverage, but Alpert dealt with the engineer from there, sending him a copy of the construction permit application, preparing the Showing, and filing it without further involvement or any review by Haston. At the time the Threshold Showing was proposed to Haston, he had only recently resolved the contentious bankruptcy negotiations that had threatened the station's future. Nothing in the record suggests that, when Alpert proposed making a Threshold Showing and Haston agreed to it, Haston focused on anything more than his continuing intention to move the station to Promontory Point. All of the Promontory Point sites ever considered for KJQN-FM were close to each other on Chournos land. The construction permit

granted for the move had not been abandoned, although it needed modification as the station had repeatedly told the Commission, and the exact location on Chournos' land made no appreciable difference in the station's predicted coverage. *See* Abacus Exh. 4.[5]

11. This latter point is important in our analysis of Haston's intent, for it supports Abacus' position that, although Abacus sought comparative credit for the coverage advantage from its plans to move to Promontory Point, it did not then intend to deceive the Commission about the plans. The ALJ read Haston's motive differently, finding that at the time of the filing Abacus had both an aggressive competitor and no entitlement to a renewal expectancy. But, this is an overstatement. When Haston agreed to the Threshold Showing he had been advised by counsel that his competitor was a weak applicant and that Abacus did qualify for a renewal expectancy. Tr. 221, although at some point Alpert had cautioned Haston that the renewal expectancy could possibly be turned down. Tr. 189. Only later, after Abacus had filed its renewal expectancy showing and the ALJ had rejected it, did Haston learn he was not entitled to it.

12. Another important consideration here is counsel's role in preparing the filing. Although the Commission is reluctant to excuse an applicant's procedural deficiencies because of the alleged malfeasance of counsel, *see, e.g., Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419, 420 n.6 (1986), the Commission has been equally reluctant to impute a disqualifying lack of candor to an applicant where the record shows good faith reliance on counsel. *See WEBR, Inc. v. FCC*, 420 F.2d 158, 167-68 (D.C. Cir. 1969) (good faith reliance on counsel is relevant to determining who is acting with candor); *Professional Radio, Inc.*, 2 FCC Rcd 6666 (1987) (applicant not penalized for giving name of new site owner without first getting his consent where amendment was made on advice of counsel and engineer and site owner later gave consent); *Broadcast Associates of Colorado*, 104 FCC 2d 16 (1986) (applicant who improperly certified application on advice of counsel not disqualified);[6] *cf. Cannon Communications Corp.*, 5 FCC Rcd 2695, 2700 (Rev. Bd. 1990) (no fraudulent intent found where misinformation resulted from engineer error), *rev. denied*, 6 FCC Rcd 570. *Compare RKO General, Inc. v. FCC*, 670 F.2d 215 (D.C. Cir. 1981) (applicant lacked candor where it responded through counsel to factual allegations of concern to FCC with the "stonewall" of a general denial), *cert. denied*, 456 U.S. 927, 457 U.S. 1119 (1982); *Pontchartrain Broadcasting Co., Inc.*, 7 FCC Rcd 3264 (Rev. Bd. 1992) (reliance on advice of counsel did not mitigate false financial certification where applicant was aware of the misleading nature of the statement yet acquiesced in attorney's misconduct), *recon. denied*, 8 FCC Rcd 2256 (1993). In this case, counsel accepts full responsibility for initiating the Threshold Showing and for the erroneous information in it. The ALJ did not believe Alpert's explanation that he acted hurriedly and without himself focusing on the exact location, because he did not believe that a professional would make such a mistake or forget his earlier participation in advising the Commission that a site was still being selected. 7 FCC Rcd at 6008 ¶ 30. But, to disbelieve Alpert's explanation for the reasons given by the ALJ is to suggest that Alpert colluded with Haston in deceiving the Commission, a situation, we hasten to add, for which we find no record support. The ALJ tries to sidestep such an accusation by saying that Alpert relied on Haston for the facts, but the record does not show that Haston told Alpert anything more than that he still intended to move to Promontory Point. Alpert testified that he believed he could show whatever he thought appropriate in the Threshold Showing, Abacus Exh. 2 at 11, although he knew of no site other than the one reflected in the construction permit. Tr. 277. When the circumstances regarding preparation of the Threshold Showing are considered along with the timing of the bankruptcy negotiations, which had Haston's attention, and the station's consistent efforts to move to Promontory Point, the most rational explanation is the one given by both Haston and Alpert -- that neither focused on the significance of the details of the planned move in the Threshold Showing. A hastily made mistake, without deceptive intent, is not a lack of candor. *See Fox River Broadcasting, Inc.*, 93 FCC 2d at 129.

13. *Explanation of Threshold Showing.* The ALJ made no findings regarding the candor of Abacus' later explanations about how the Threshold Showing came about, but both Abacus and the Bureau have addressed Abacus' Reply to Oppositions to Threshold Showing and Opposition to Motion to Enlarge in their Briefs to the Board. In both Abacus pleadings below, which Alpert prepared, Abacus argued that its failure to disclose its "previously disclosed intention to obtain authority to construct at the |Chournos site|" was purely inadvertent. But, the disclosure of an intent to build at the Chournos site was in an extension of time request from Greenleigh on behalf of Utah Broadcasting and appeared to be disclaimed in Haston's January 14, 1991 letter attached to Abacus' January 1991 extension request:

> |W|e have begun engineering studies to determine the absolute best location and site for KJQN-FM on Promontory Point. By early spring of 1991 we will be able to visit all the site options on Promontory Point and choose the site.

Joint Exh. 5 at 3; *see* ¶ 8 *supra*. At Chournos' suggestion, Abacus negotiated to use the Utah Gas tower being built in the same area. Haston explained that, when negotiations were terminated, "|W|e were back to the initial concept of building our tower on land owned by Mr. Chournos 0.3 kilometer NNE of the existing radio tower." Abacus Exh. 1 at 9. But, shortly after the negotiations were terminated, Alpert had written to the Commission explaining that Abacus needed additional time to file its modification application because "Abacus is currently in the process of attempting to acquire an alternative site." Joint Exh. 6. This was followed by the period during which Haston had his "mental reservation" about proceeding with the up-

[5] The likelihood that the Commission would grant a minor modification of the construction permit to specify the Chournos site did not appear to be in doubt during this proceeding. Abacus filed the application on March 27, 1992. Abacus Exh. 2 App. A.

[6] In *Broadcast Associates* the applicant later rehabilitated by the Commission had also admitted to giving false deposition testimony. *See* 100 FCC 2d 616, 616-24 (Rev. Bd. 1985). Nonetheless, the Commission did not find that the applicant had shown an unacceptable "proclivity to dissemble" to the agency under the circumstances, and it awarded her the permit. 104 FCC 2d at 19; *see also* 100 FCC 2d at 624-25.

grade in light of the bankruptcy problem, *see* Joint Exh. 1 at 9, and Abacus did not finally acquire the KJQN-FM assets until after the Threshold Showing was filed. Nothing in the record suggests that Haston refocused his attention on the move to Promontory Point until Alpert called the afternoon before filing the Showing to ask if Abacus still intended to move to Promontory Point. The engineering work for the modification did not begin until after the Showing had been submitted and objections raised. Tr. 187. When asked to reconcile his statement in the January 1991 extension request (Joint Exh. 5) with the claim to a site, Haston testified on cross-examination: "Well, we wanted to pick out another site, but it was going to be in that three kilometer area." Tr. 183. He agreed this meant that, if he were not going to use the Chournos site selected by Greenleigh, it was going to be somewhere close by, within a short walking distance of all the sites discussed in this proceeding. Tr. 183-84.

14. Abacus' pleadings explaining the Threshold Showing created the impression that Abacus had already made its decision about where it would locate its transmitter on Promontory Point but, according to the record here, it did not finalize this decision until *after* the Threshold Showing was challenged. The Bureau excuses the inaccurate claim that Abacus had previously disclosed its intention to use the Chournos site with the comment that this claim "appears to be either careless or sly wording by Alpert." Bureau Reply Brief at 7. Abacus argues that its erroneous claim to having itself disclosed its intent to use the Chournos site is immaterial because it had reasonable assurance of the site. Abacus Brief at 8-10. Both miss the point for the Commission expects applicants and licensees to "be scrupulous in providing complete and meaningful information." *Lorain Journal Co. v. FCC*, 351 F.2d 824, 830 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966), *quoted in Fox River Broadcasting, Inc.*, 88 FCC 2d 1132, 1137 (Rev. Bd. 1982), *modified in other respects*, 93 FCC 2d 127 (1983). Haston and only Haston knew the status of the site selection, and he could not help but be aware that the status was at the heart of the controversy about the Threshold Showing. The fact that sites were available for Abacus' choosing does not fulfill Abacus' obligation to advise the Commission of exactly that. Abacus' failure to clarify where he stood in the selection process was misleading, particularly in light of its earlier statements that the process was ongoing. This failure continued the misinformation unwittingly started with the Threshold Showing and has needlessly prolonged this proceeding.

15. The question is a close one as to whether Abacus intended to deceive the Commission about the status of its site. The pleadings by Alpert show a desire to rehabilitate the Threshold Showing, and only on cross-examination did Haston finally explain what he meant about what he envisioned for the site, *i.e.*, if not the Chournos site, then something within a short walking distance of it. On balance, from our reading of the record as a whole, we do not find a deceptive intent that would disqualify Abacus for lacking candor about its site. *See Leflore Broadcasting Co.*, 636 F.2d at 461; *Character Policy Statement*, 102 FCC 2d at 1196; *Fox River Broadcasting*, 93 FCC 2d at 129. As pointed out in the discussion of the Threshold Showing, *supra*, Abacus planned to move to Promontory Point and, if it could not share a tower built for someone else, it would build its own on nearby land owned by Chournos. Although the precise placement of the tower does not appear from this record to have been resolved until Abacus' engineer addressed that question, Abacus' access to the land was never in doubt,[7] even if, after making its own engineering analysis of its options on Chournos' land, it were to choose a spot that was a short walking distance from the "Chournos site" that Greenleigh and Utah Broadcasting had identified a few years earlier.[8] *See generally Harry D. Stephenson*, 33 FCC 2d 749, 750-53 (Rev. Bd. 1972) ("contrived" explanation about having land for site on hand not intended to deceive where applicant had option for land and funds for purchase price).[9]

REMEDY/SANCTION

16. *Forfeiture.* Although Abacus is not disqualified from holding a Commission license in light of our conclusion that it did not intentionally try to deceive the Commission, its failure to provide complete information about the status

[7] Haston did not personally talk with Chournos about the site until February 1992. 7 FCC Rcd at 6007 ¶ 29. However, in contacts over a number of years with Haston, Greenleigh, and Haston's engineer, Chournos had consented to use of his land for KJQN-FM, and nothing in this record suggests that he had changed his mind.

[8] The ALJ made a credibility finding in paragraph 29 regarding Haston's testimony about when the new site was arranged. The Board ordinarily gives great deference to the credibility findings of an ALJ, *see TeleSTAR, Inc.*, 2 FCC Rcd 5, 12-13 (Rev. Bd. 1987), *recon. granted in part and denied in part and review granted in part and denied in part*, 3 FCC Rcd 2860 (1988), *aff'd by judgment*, 886 F.2d 442 (D.C. Cir. 1989) (Table), when supported by substantial evidence. *See Naguabo Broadcasting Co.*, 6 FCC Rcd 912, 919 (Rev. Bd. 1991), *modified on other grounds on recon.*, 7 FCC Rcd 1696 (1992). Nonetheless, the Board must make a fair estimate of all the relevant record evidence and not merely rubber stamp the findings of an ALJ. *See generally FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358 (1955); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 489-90 (Frankfurter, J.). Having looked at the candor issue in two parts, *i.e.*, the circumstances surrounding the Threshold Showing itself, and the accuracy of Abacus' subsequent explanation, we have viewed the record in a different fashion than the ALJ did. As we have viewed the case, this credibility finding is more relevant to the question of Abacus' intent in its explanation of the Showing than of the intent behind the Showing itself. Although we agree with the ALJ that Abacus had not selected the specific alternative site when it filed its Threshold Showing, we do find credible from the relevant record evidence Abacus' explanation that it did have access to some site on Promontory Point. We have not weighed the specific demeanor findings made by the ALJ in paragraph 35 and n.2 , 7 FCC Rcd at 6008-09, for these are directed to Haston's knowledge before the Threshold Showing was filed that the Guthrie site was no longer feasible, a point neither denied by Haston nor relevant to his intent after the Showing was filed.

[9] *Compare Richardson Broadcasting Group*, 7 FCC Rcd 1583 (1992) (false testimony and evasive responses at hearing regarding integration intention disqualifying), *aff'd by judgment sub nom. Younts v. FCC*, No. 92-1119 (D.C. Cir. May 10, 1993); *Maria M. Ochoa*, 7 FCC Rcd 6569, 6571-72 (Rev. Bd. 1992) (same), *rev. denied*, 8 FCC Rcd 3135 (1993); *Emision De Radio Balmaseda, Inc.*, 7 FCC Rcd 3852, 3858 ¶ 37 (Rev. Bd. 1992) ("[T]he Commission's demand for absolute candor is itself all but *absolute*."); *Mid-Ohio Communications, Inc.*, 104 FCC 2d 572 (Rev. Bd. 1986) (reversing ALJ's renewal grant because of applicant's egregious wrongdoing in exhibiting a substantial lack of candor in FCC proceedings and repeatedly misrepresenting crucial facts to the FCC).

of the Promontory Point site violated section 1.17 of the Commission's rules, 47 CFR 1.17.[10] Thus, we conclude that Abacus should be assessed a forfeiture of five thousand dollars.

17. Section 1.17 provides:

> The Commission or its representatives may, in writing, require from any applicant, permittee or licensee written statements of fact relevant to a determination whether an application should be granted or denied . . . or to some other matter within the jurisdiction of the Commission. No applicant . . . or licensee shall in any . . . application, pleading, report or any other written statement submitted to the Commission, make any misrepresentation or willful material omission bearing on any matter within the jurisdiction of the Commission.

The information Abacus failed to provide was material to evaluating the merits of the Threshold Showing Abacus submitted in furtherance of its renewal application and later to evaluating Abacus' explanation of the Showing. Haston had consented to filing the Threshold Showing and knew the pleadings were being filed on his behalf, making the omission of the site status information willful in violation of section 1.17 and punishable under the forfeiture provision of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b)(1)(B). "[W]illful means that the licensee knew he was doing the act in question, regardless of whether there was an intent to violate the law." H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

18. The Bureau argues without offering any citations that a forfeiture cannot be imposed under section 1.17 unless Abacus evidenced an intent to deceive the Commission with its inaccuracies and mistakes. Bureau Reply Brief at 8. We disagree for the operative language of the section is "willful material omission." "Willful" is a term of art that Congress clarified in the 1982 amendments to the Communications Act:

> The term "willful", when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of the Act or any rule or regulation of the Commission authorized by this Act ... .

47 U.S.C. § 312(f)(1). The Conference Report accompanying the amendment makes clear that this definition applies to the use of the term "willful" in Section 503 as well. *See Southern California Broadcasting Co.*, 6 FCC Rcd 4387, 4387-88 ¶ 5 (1991). Given Congress' explicit definition in our governing statute, the Board will not read a different meaning into the word as used in the Commission's rules absent explicit instructions from the Commission to do so. We do not find a different interpretation of "willful" in the *Character Policy Statement* adopting section 1.1015,[11] the later *Policy Regarding Character Qualifications* adopting section 1.17, or subsequent Commission precedent.

19. Abacus argues that the ten thousand dollar forfeiture imposed by the ALJ is too high. On this point we are in agreement, although for reasons different than those argued by Abacus. In *Standards for Assessing Forfeitures* the Commission sought to implement the revisions to its forfeiture authority in Pub. L. No. 100-239, 103 Stat. 2131, by replacing the traditional case-by-case approach with standards based on its ranking of the relative gravity of generic classes of violations. 6 FCC Rcd at 4695. It identified types of violations and computed base forfeiture amounts for each as a percentage of the statutory maximum amount for the service involved, with the percentage reflecting the gravity of the class of offense. The ALJ in this case found that Abacus lacked candor, so began his computation of the forfeiture amount with the base forfeiture specified for misrepresentation/lack of candor. Because we do not find that Abacus' violation arose from an intent to deceive the Commission, an element essential to both misrepresentation and lack of candor,[12] we conclude that it does not fall within the misrepresentation/lack of candor category of violations for which the Commission set a base forfeiture of $20,000. From our review of *Standards for Assessing Forfeitures* and the Commission's reconsideration thereof, we find that the most appropriate category is that for miscellaneous violations for which the base recommended forfeiture is $1,250. After applying the analytic factors of the *Character Policy Statement*, 102 FCC 2d at 1227-28,[13] and the adjustment factors in the Commission's reconsideration of its *Standards for Assessing Forfeitures*, 7 FCC Rcd at 5345,[14] we conclude that the forfeiture in this case

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[10] With the adoption of the *Character Policy Statement*, 102 FCC 2d at 1233-34, the Commission codified in section 73.1015 of its rules its long-standing prohibition against misrepresentation and willful omissions or lack of candor. Its intent was to provide greater flexibility to impose sanctions where conduct did not warrant disqualification. Because this rule appeared only in the part of the Commission's rules governing broadcast applicants, licensees, and permittees, the Commission later added substantially the same text to section 1.17 of its General Rules of Practice and Procedure governing applicants, licensees, and permittees in all radio services. *Policy Regarding Character Qualifications in Broadcast Licensing*, 5 FCC Rcd 3252, 3253 ¶ 10 (1990) (subsequent history omitted).

[11] 47 CFR 1.1015 was adopted to give the Commission additional flexibility in dealing with untruthful responses. *Character Policy Statement*, 102 FCC 2d at 1234.

[12] In *Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 (1983), the Commission "disavow[ed] the Review Board's suggestion that lack of candor may involve failures to provide information in the absence of any deceptive intent." It emphasized that lack of candor, like misrepresentation, involves deceit.

[13] The *Character Policy Statement* finds relevant the willfulness of the misconduct, the frequency of such behavior, and its currency, the seriousness of the misconduct, the nature of the participation of managers and owners, the efforts made to remedy the wrong, and the applicant's record of compliance.

[14] In its reconsideration of *Standards for Assessing Forfeitures*, the Commission repeated the adjustment criteria originally adopted with its forfeiture standards, 6 FCC Rcd at 4697. The upward adjustment criteria are: egregious misconduct; ability to pay/relative disincentive; intentional violation; substantial harm; prior violations of same or other requirements; substantial economic gain; and repeated or continuous violation. The downward adjustment criteria are: minor violation; good faith or voluntary disclosure; history of overall compliance; inability to pay. These elaborate on the factors set forth in 47 CFR 1.80(b)(4): "the nature, circumstances, extent and gravity of the

should be assessed at $5,000 to reflect the seriousness of Abacus' failure to be fully candid in its submissions to the Commission and to deter Abacus from similar conduct in the future.[15] Abacus sought comparative advantage from the Threshold Showing and sought to rehabilitate it with its later pleadings. Haston, President of Abacus, failed to take the responsibility necessary to ensure fully accurate and informative submissions to the Commission. He authorized the Threshold Showing without addressing the specifics; he failed to even review it after it had been filed; and he did not correct the misimpression about the status of the site being conveyed in the later pleadings.

20. Abacus also argues against the forfeiture because: the Bureau put on no special evidence as to why a forfeiture would be appropriate; and forfeiture liability was not separately litigated in the hearing and no economic or other mitigating evidence was offered or considered. Abacus Brief at 22-23. We disagree. Abacus was free to offer evidence in mitigation of the forfeiture in addition to the evidence it offered in mitigation of the underlying candor issue -- and it bore the burdens of proceeding and proof on the designated issues[16] -- the ALJ was under no obligation to try the question of the appropriate remedy or sanction separately from the case as a whole.[17] As discussed below, Abacus had notice that a forfeiture was a possibility, and it has not complained that any tendered mitigating evidence was rejected. The only factor that Abacus specifically complains was not addressed in the hearing was Abacus' ability to pay. But, Abacus' argument that the ALJ erred in not considering this is without merit, for an "application of a downward adjustment [of a forfeiture] for inability to pay is based upon a showing of substantial financial hardship," which must be a "specific showing by the entity against whom forfeiture action is taken." *Standards for Assessing Forfeitures*, 6 FCC Rcd at 4700 n.6 ; *David R. Price*, 7 FCC Rcd 6550, 6551 ¶ 11 (1992), *recon. denied*, 8 FCC Rcd 2960 (1993). Abacus tendered no showing. The ALJ cannot be faulted for failing to speculate when Abacus failed to carry its burden regarding its own financial circumstances. Finally, the ALJ did not err in not adopting the Bureau's advocacy position as his conclusion. The Bureau appears as a party, not the decision-maker. Although its views are valuable, the Commission and those to whom it has delegated authority in adjudicatory cases must render an objective opinion based on a preponderance of the record evidence and on Commission precedent.

21. Finally, Abacus complains that a forfeiture cannot be issued because the ALJ's passing reference to the possibility of a forfeiture in his *Memorandum Opinion and Order* does not meet the notice requirement of section 1.80(e) of the Commission's rules, 47 CFR 1.80(e). But, this argument ignores the specific designation of the forfeiture issue along with the basic qualifications, candor, and abuse of process issues in the ordering clauses at the end of the document. Unlike *McElroy Electronics Corp. v. FCC*, 990 F.2d 1351 (D.C. Cir. 1993), where notice of a change in filing procedures was inadequate when contained in the last sentence of the last footnote of a report and order and the Commission conceded that the language was confusing, the ordering language here was highlighted with capital letters announcing the designation of issues and the text of each issue was indented. The forfeiture issue was added in response to the Bureau's specific request for a forfeiture issue. *See* Mass Media Bureau's Motion to Enlarge Issues, filed Jan. 31, 1992. The ALJ's *Memorandum Opinion and Order* discussed the underlying allegations of misconduct. In concluding this discussion, the ALJ specifically noted the Bureau's request for a forfeiture issue and advised, "Abacus should be aware that that possibility exists." FCC 92M-308 at 5 ¶ 13.[18] The designation of the forfeiture issue by the ALJ is clear and complies with the Commission's direction to include a forfeiture notice when enlarging issues to inquire into allegations of misconduct occurring during the application process, if the alleged misconduct is subject to the forfeiture provisions of 47 U.S.C. § 503(b)(2)(A). *Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd 157, 164 ¶ 51 (1990), *partial recon. granted in other respects*, 6 FCC Rcd 3403, 3404-05 ¶ ¶ 17-18 (1991).[19] The designation of a specific forfeiture issue in the ALJ's ordering clauses met the notice requirement of section 1.80(e).[20]

22. *Short-term Renewal.* The essence of the licensing process is an evaluation of an applicant's proclivity to deal truthfully with the Commission and to comply with the Communications Act and the Commission's rules and policies. *Character Policy Statement*, 102 FCC 2d at 1190-91. Although the Board concludes that Abacus' conduct is not disqualifying, Abacus has not met the "high standards of punctilio" expected of broadcasters that the court has translated into an expectation that licensees "be scrupulous in providing complete and meaningful information" to the

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violations and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."

[15] In both the *Character Policy Statement*, 102 FCC 2d at 1211, and the reconsideration of *Standards for Assessing Forfeitures*, 7 FCC Rcd at 5339-40, the Commission emphasized that it has broad discretion in choosing remedies and sanctions and that the exercise of this discretion ultimately must be based on the record evidence.

[16] The ALJ assigned Abacus the burdens of proceeding and proof under all of the designated issues "because it has within its control and knowledge the relevant facts." *Memorandum Opinion and Order*, slip op. at 5 ¶ 13.

[17] "A sanction may not be imposed . . . except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d).

[18] While both cases cited by Abacus, *Special Markets Media, Inc.*, 4 FCC Rcd 5753 (1989), and *Salzer v. FCC*, 778 F.2d 869 (D.C. Cir. 1985), deal with the general proposition that those being held to exacting application standards must have clear notice of such standards, neither suggests that notice of a forfeiture is inadequate when a specific forfeiture issue has been designated for an adjudicatory hearing before an administrative law judge; the ALJ designating the issue has discussed the underlying allegations in his memorandum opinion; and there is no complaint that the party subject to the forfeiture did not receive actual service of the notice.

[19] Section 1.80(e) provides that a forfeiture proceeding may be initiated either with a notice of apparent liability, which was not issued in this case, or with a notice of opportunity for hearing. If Abacus' complaint is that the document designating the additional issues against it was captioned "Memorandum Opinion and Order" rather than "Notice of Opportunity for Hearing," this is a matter of form over substance, for Abacus was already in hearing, the ALJ's order enlarged the hearing issues against it, and Abacus was heard on these issues.

[20] We, like Abacus, see no relevance to the ALJ's concluding discussion of Abacus' change of counsel, 7 FCC Rcd at 608-09 ¶ 36, and have not considered it herein.

Commission. *Lorain Journal Co. v. FCC*, 351 F.2d 824, 830 (D.C. Cir. 1965), *quoted in Fox River Broadcasting, Inc.*, 88 FCC 2d 1132, 1137 (Rev. Bd. 1982), *modified in other respects*, 93 FCC 2d 127 (1983). For this reason, the Board agrees with the ALJ that Abacus should receive a two-year short-term renewal so that the Commission can review Abacus' reliability after a reasonable period. Our determination that a short-term renewal is appropriate is reinforced by the problems with the Threshold Showing, which resulted from Haston's abdication of his responsibility to ascertain the facts before submitting a pleading to the Commission and to review afterwards what had been filed on his behalf. *See RKO General, Inc. v. FCC*, 670 F. 2d at 231; *Sea Island Broadcasting Corp. of South Carolina*, 60 FCC 2d 146, 152-53 (1976), *aff'd*, 627 F.2d 240 (D.C. Cir.), *cert. denied*, 449 U.S. 834 (1980).[21] While his failure to exercise this responsibility supports the Board's conclusion that Abacus did not have deceptive intent in filing the Threshold Showing, nonetheless, it reflects adversely on the reliability of Abacus' representations to the Commission.[22] The Commission must rely on information from those it regulates when carrying out its broad responsibilities, but it lacks the resources to independently verify a licensee's representations. Thus, when issuing a license it must be assured that a licensee's representations are reliable -- and that its licensees understand their duty to provide accurate and complete information. *See Gross Telecasting, Inc.*, 92 FCC 2d 204, 245-46 (Rev. Bd. 1982) (short-term renewal of two years appropriate for unintentional lack of candor), *rev. denied*, FCC 83-443, released Nov. 21, 1983.

23. ACCORDINGLY, IT IS ORDERED That the application of Abacus Broadcasting Corp. (File No. BRH-900530A2) for renewal of the license of station KJQN-FM operating on 95.5 MHz at Ogden, Utah IS GRANTED for a period of two years from the release of the *Initial Decision*.

24. IT IS FURTHER ORDERED That Abacus Broadcasting Corp. IS ASSESSED a forfeiture penalty of $5,000 to be paid within 40 days following release of this decision as provided in 47 C.F.R. § 1.80(h).

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

SEPARATE STATEMENT
OF
BOARD MEMBER NORMAN B. BLUMENTHAL

My colleague, Board Member Greene, has done a thorough job in culling this record, analyzing applicable precedent, and -- I believe -- reaching the proper result(s) for two chief reasons.

First, the particular attorney involved in preparing this licensee's engineering study has a pronounced habit of bizarre engineering showings and arguments. *See, e.g., Naguabo Broadcasting Co.*, 6 FCC Rcd 992, 912-917 (Rev. Bd. 1991)(attorney first argues that his applicant, who would have placed a city-grade signal of *zero percent* over community-of-license, should prevail over applicants short-spaced by only 3 km; attorney *later* claims to have "discovered" *after* Initial Decision that (1) applicant's "transmitter site was misplotted by several thousand feet *and* that its proposed tower height was 184 feet *lower* than actually anticipated," as well as (2) that if allowed a *new* engineering showing, his applicant "might show that 'a city grade signal would indeed occur over most of Naguabo'... by means of an on-channel booster.")(subsequent history and settlement order omitted). To the degree that this *Decision* shifts much of the "blame" for the licensee's transgressions to counsel -- a shift both counsel (including original counsel) and the client urge -- and tilts toward the *WEBR* line of cases, *see ante* para. 12, I am in accord based on the specific facts of this case.[1]

Second, in *Mid-Ohio Communications, Inc.*, 104 FCC 2d 572 (Rev. Bd. 1986), *review denied*, 5 FCC Rcd 940 (1990), *recon. denied*, 5 FCC Rcd 4596 (1990), *aff'd per judgment*, 946 F. 2d 1565 (D.C. Cir. 1991), the Board (and later the full Commission) declined to use a remedy less drastic than non-renewal. Citing the then-recent *Character Policy Statement*, *ante* para. 3, I wrote in a separate statement:

> The Board has employed the lesser sanction of a short-term renewal, and seriously considered that sanction here. However, that sanction is appropriate when the purpose is to test future compliance with FCC operating requirements, and is plainly inapposite when dealing with egregious lack of candor in the very prosecution of a competing application. For the latter, there is no routine opportunity to "test." Here, we are confronted not with WOKO's "immaterial and useless deceptions," but with grave ones going to the core of the licensee's comparative application. In such cases, the *Character Policy Statement* demands the result here obtaining.

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[21] *See also George E. Cameron Jr. Communications*, 91 FCC 2d 870, 895 (Rev. Bd. 1982) ("[A]s the Board, the Commission, and the courts have held, a licensee (and license applicants as well) have an affirmative duty to go much beyond the barest technical accuracy and must candidly apprise the Commission of *all* circumstances which are likely to be of a decisional significance."), *recon. denied*, 93 FCC 2d 789 (Rev. Bd. 1983).

[22] *Cf. Fox Television Stations, Inc.*, 8 FCC Rcd 2361 (Rev. Bd. 1993) (failure to file information contributed to diminution of renewal expectancy but was not disqualifying).

[1] As the Commission just echoed to the court, "[t]he more erratic the conduct of counsel, the greater the equities usually running to the client." Brief For Appellee at 14, *Innovative Women's Media Ass'n v. FCC*, No. 92-1525 (D.C. Cir. filed May 21, 1993)(quote originally appearing in *Mark A. Perry*, 4 FCC Rcd 6500, 6504 (Rev. Bd. 1989)(separate statement)).

104 FCC 2d at 603 (footnote omitted). Finding in the instant case no egregious lack of candor similar to that encountered in *Mid-Ohio*, the lesser sanctions imposed here seem both justified and consistent with precedent. *See generally Gross Telecasting, Inc.*, 92 FCC 2d 204 (Rev. Bd. 1982), *review denied*, FCC 83-433, released November 2, 1983.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

1993 Annual Access Tariff Filings	**CC Docket No. 93-193**
National Exchange Carrier Association Universal Service Fund and Lifeline Assistance Rates	Transmittal No. 556 **CC Docket No. 93-123**
GSF Order Compliance Filings	
Bell Operating Companies Tariff for the 800 Service Management System and 800 Data Base Access Tariffs	**CC Docket No. 93-129**

ERRATUM

Released: July 22, 1993

By the Acting Chief, Common Carrier Bureau:

1. Appendix B to the above-referenced order is revised as follows:

APPENDIX B
(revised)

List of Parties to Investigation

Alltel Telephone System
Ameritech Operating Companies
Anchorage Telephone Utility
Bay Springs Telephone Company, Inc.
Bell Atlantic Telephone Companies
BellSouth Telecommunications, Inc.
Centel Telephone Companies
Century Telephone of Ohio, Inc.
Century Telephone of Wisconsin, Inc.
Chillicothe Telephone Company
Cincinnati Bell Telephone Company
Citizens Telephone Companies
Concord Telephone Company
Dunkirk & Fredonia Telephone Company
Elkhart Telephone Company
Granite State Telephone Company
Great Plains Communications
GTE Telephone Operating Companies
GTE System Telephone Companies
GVNW, Inc./Management
Illinois Consolidated Telephone Company
La Fourche Telephone Company
Lincoln Telephone Company
Lufkin-Conroe Telephone Exchange
Merrimack County Telephone Company
National Exchange Carrier Association
Nevada Bell
NYNEX Telephone Companies
Ogden Telephone Company
Pacific Bell
Rhinelander Telephone Company
Rochester Telephone Corporation
Roseville Telephone Company
Southeast Telephone Company of Wisconsin
Southern New England Telephone Company
Southwestern Bell Telephone Company
Sugarland Telephone Company
TEC Communications Services
Telephone Utilities Exchange Carrier Association
United Telephone Association, Inc.
United Telephone System
US West Communications, Inc.
UTELCO, Inc.
Virgin Islands Telephone Company
Vista-United Telecommunications
Walnut Hill Telephone Company
Warwick Valley Telephone Company
Wilkes Telephone and Electric Company
Wood County Telephone Company

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PanAmSat, L.P. File No. CSS-91-003

Request for Waiver of
Section 319(d) of the
Communications Act, as amended

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: July 14, 1993; Released: July 30, 1993

By the Commission:

I. INTRODUCTION

1. The Commission has before it the requests of PanAmSat, L.P. (PAS)[1] for waivers pursuant to Section 319(d) of the Communications Act, as amended, to allow it to spend up to an additional $170.75 million to construct its international separate satellite (PAS-4).[2] The requests were placed on public notice September 21, 1992 and March 1, 1993, respectively, and no comments were filed.[3]

2. In an order granting PAS conditional authorization to construct PAS-4, the Commission stated that PAS may not begin construction of its satellite without demonstrating current financial ability to meet the costs of construction and launch, and operating expenses for one year after launch.[4] The Commission noted that in order to allow construction to proceed prior to this time, PAS would need to secure a waiver pursuant to Section 319(d) of the Communications Act. The Common Carrier Bureau has subsequently granted PAS authority pursuant to Section 319(d) to spend a total of $66 million for construction of PAS-4.[5] Of this amount, $51 million has been authorized as interim waivers since PAS submitted the pending waiver request. In the instant request, PAS asks the Commission for authority to spend the remainder ($119.75 million) of its proposed $170.75 million in expenditures through March 31, 1994 for the PAS-4 satellite.[6]

3. PAS states that competitive pressures and market demand make it imperative for PAS to move forward on an expedited basis. PAS asserts that both INTELSAT and numerous separate systems ventures, many of them foreign-based, are moving quickly in an effort to meet the growing demand for satellite communications services in the Pacific Ocean Region (POR). PAS argues that it is neither practical nor administratively efficient for it to keep pace with escalating satellite construction payments and pre-launch expenditures through the relatively small expenditure authorizations heretofore granted PAS. PAS contends that requiring it to seek authorizations for such small amounts would risk disruption of its satellite construction and launch schedules. PAS states that it understands and accepts the risks, regulatory and otherwise, in proceeding with construction and prelaunch expenditures, with only a conditional authorization in hand.

II. DISCUSSION

4. Under the Commission's *Separate Systems* decision, an applicant proposing to construct, launch and operate an international separate satellite may not begin construction of the satellite until it has obtained final authorization to do so by the Commission.[7] The Commission will grant such authority only upon a demonstration of the applicant's current financial ability to meet the costs of construction and launch, and operating expenses for one year after launch.[8] In applying this criterion to PAS, the

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[1] On December 31, 1992, the Chief, Common Carrier Bureau, authorized the assignment to PAS of Alpha Lyracom's PAS-4 conditional authorization. *Alpha Lyracom, d/b/a Pan American Satellite*, 8 FCC Rcd 376 (1993). All references to PAS in this order are intended to refer to Alpha Lyracom and/or PanAmSat, L.P.

[2] PAS' initially requested a waiver to allow it to spend up to an additional $130 million for PAS-4. *See* Letter, dated August 3, 1992, from Henry Goldberg and Jonathan L. Wiener, Counsel for PAS, to Cheryl A. Tritt, Chief, Common Carrier Bureau, FCC (*August 3, 1992 Letter*). This amount was in addition to $15 million previously authorized by the Common Carrier Bureau. PAS subsequently amended its request to ask for authorization to spend up to an additional $170.75 million on PAS-4. *See* Letter, dated January 25, 1993, from Henry Goldberg and Jonathan L. Wiener, Counsel for PAS, to Cheryl A. Tritt, Chief, Common Carrier Bureau, FCC (*January 25, 1993 Letter*).

[3] *See* Report Nos. DA 92-1275 and I-6772.

[4] *Alpha Lyracom, d/b/a Pan American Satellite*, 6 FCC Rcd 5132 (1991).

[5] We note that under Section 0.291(d) of the Commission's rules, 47 C.F.R. § 0.291(d) (1992), the Bureau Chief may not grant a construction permit for a non-common carrier satellite system, or any part thereof, where the construction costs exceed $10 million.

[6] PAS estimates its total prelaunch expenditures at $205 million. *See January 25, 1993 Letter*.

[7] *See Establishment of Satellite Systems Providing International Communications*, 101 FCC 2d 1046, 1165 (1985).

[8] *Id.* This showing would include: 1) the submission of a balance sheet verified by affidavit, demonstrating, *inter alia*, the applicant's financial ability current for the latest fiscal year; and 2) documentation of any financial commitments reflected in the balance sheet together with an exhibit demonstrating that the applicant has current assets and operating income sufficient to meet its estimated construction, launch and operation costs and expenses. Newly established entities must submit an exhibit indicating the estimated income or revenues anticipated from the proposed operation of the satellite system necessary to meet the estimated costs of construction, launch and operation along with any additional information requested by the Commission, which would include scheduled debt financing or stock issues, established lines of credit or other forms of internal financing. *Separate Systems*, 101 FCC 2d at 1065-6.

In addition, the Commission will not grant final authority to construct launch and operate a separate satellite system until it receives from the State Department a letter stating that consultations pursuant to Article XIV(d) of the INTELSAT Agreement have been completed for the specific satellite.

Commission stated that PAS may not begin constructing PAS-4 until it demonstrates sufficient non-contingent funds to meet these projected costs.[9] Only through a waiver pursuant to Section 319(d) may PAS begin construction before obtaining final construction authorization.[10]

5. On the basis of all the facts before us, we conclude that allowing PAS to expend funds on construction of PAS-4 in this situation would not undermine the purposes underlying the financial qualifications standard in *Separate Systems*. The financial qualification standard is intended to prevent an entity that is financially unable to construct, launch and operate a separate system from holding an orbital slot to the detriment of a financially qualified applicant, and to ensure the prompt availability of space segment capacity.[11] In the *Separate Systems* decision, the Commission said it would withhold authority to construct a separate satellite system until the Commission was sure the applicant could raise the funds necessary to construct, launch and operate the satellite system. This standard prevented an entity from holding an orbital slot without being able to use it. In this case, however, PAS has begun construction of the satellite system, has expended (at its own risk) a large amount of money to building PAS-4, has committed itself to a construction contract under which it must spend significantly more on a regular basis, and has certified to the Commission that it believes it can make a full financial showing for PAS-4 within the next 12 months.[12] Thus, it is reasonable to conclude that PAS will continue to take all necessary steps to meet its stated in-service date of the second quarter 1994.[13]

6. Finally, we recognize the increasing competition that U.S. separate systems face in the world market and the need to afford U.S. separate systems an early start when doing so would not prejudice other U.S. separate system operators or applicants. Specifically, PAS has noted the growing demand for satellite communications services in the POR, and the emergence of global competition, some of which is foreign-based, to meet this demand. As stated previously, moreover, no other U.S. separate systems applicant would be prejudiced by grant of the requested waiver. We also agree with PAS that it would be neither practical nor efficient for PAS to continue requesting authority to expend funds for PAS-4 on a piecemeal basis. Rather, given the above, particularly the Landman Affidavit, PAS's recently-secured equity investment, and PAS's demonstrated ability and willingness to launch and operate a satellite system, we believe that the public interest, convenience, and necessity would be served by granting a partial waiver to PAS to expend up to an additional $131.5 million on the construction of the PAS-4 satellite system.[14]

III. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED that PAS's request for a waiver pursuant to Section 319(d) of the Communications Act, as amended, IS GRANTED, and PAS may spend up to an additional $119.75 million through March 31, 1994, on the construction (including prelaunch expenditures) of the PAS-4 satellite system.

8. IT IS FURTHER ORDERED that all expenditures and commitments incurred by PAS under this waiver in constructing the PAS-4 satellite are at its own risk.

9. IT IS FURTHER ORDERED that PAS shall report to the Commission within six months of adoption of this order on its progress in constructing PAS-4 and in obtaining full financial qualifications pursuant to the *Separate Systems*.

10. IT IS FURTHER ORDERED that, unless specifically authorized by the Commission, PAS shall expend no funds on the construction of PAS-4 after twelve months from adoption of this order, at which time PAS shall report to the Commission on its progress in constructing PAS-4 and in obtaining full financial qualifications pursuant to the *Separate Systems* decision.

11. IT IS FURTHER ORDERED that the Commission's action here is without prejudice to any future action the Commission may take on any issue related to PAS' applications for final authority to construct, launch and operate its proposed satellite system.

12. IT IS FURTHER ORDERED that this Memorandum Opinion, Order and Authorization is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[9] *See Pan American Satellite*, 6 FCC Rcd 5132 (1991).

[10] We noted, however, that if PAS can satisfy our financial requirements prior to receipt of the State Department's notification that the United States has fulfilled its Article XIV(d) obligations under the INTELSAT Agreement, we would issue PAS final construction authority. We stated that PAS would in that event bear all risks and liabilities in commencing construction of its satellite pending final Commission issuance of launch authority and a license to begin operating. *Id.* at 5133.

[11] *See Separate Systems*, 101 FCC 2d at 1064.

[12] *See* Affidavit of Frederick A. Landman, President of PanAmSat, Inc., dated April 9, 1993 (Landman Affidavit). In this context, we note that PAS has recently secured a $200 million equity investment, which, according to PAS, represents a major element in its financial package and demonstrates PAS' commitment and financial wherewithal to complete its global satellite system. *See, e.g. January 25, 1993 Letter.*

[13] *See Pan American Satellite*, 6 FCC Rcd at 5132. In this context, we note that PAS would risk losing its conditional license should it fail to make ongoing payments under its satellite construction contract, or should it fail to demonstrate financial qualifications pursuant to the *Separate Systems* decision within one year of adoption of this order.

[14] To ensure that PAS remains in compliance with the *Separate Systems* policy, however, we will require PAS to report within six months, and once again within twelve months, of adoption of this order, on its progress in constructing and in making a full financial showing for PAS-4.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Permissible Services of U.S.-Licensed International Communications Satellite Systems Separate from the International Telecommunications Satellite Organization (INTELSAT) — File No. ISP-92-006

MEMORANDUM OPINION AND ORDER

Adopted: July 14, 1993; Released: July 30, 1993

By the Commission:

1. The Commission has under consideration a petition filed by James R. Hobson requesting reconsideration of the Commission's order that modified the criteria for separate international satellite systems.[1] For the reasons discussed below, we dismiss the petition.[2]

BACKGROUND

2. In a letter dated November 27, 1991, the Executive Branch informed the Commission of the findings of a further review of U.S. policy concerning international separate satellite systems.[3] The Executive Branch stated that it had established a goal of complete elimination of the restrictions on the interconnection of international separate satellite systems with the public switched network (PSN) by January 1997. However, as an interim measure, the Executive Branch established modified criteria to be applied by the Commission prior to final authorization of non-INTELSAT satellite facilities for international communications. The modified criteria superseded previous criteria set forth in a November 28, 1984 letter from the Executive Branch.[4] The modified criteria permit separate satellite systems to provide international private line service (as defined by the Commission) interconnected to the PSN, as well as their existing permissible services.

3. In the *Separate Systems Modification* order released April 8, 1992, we adopted the modified criteria without notice and comment.[5] We stated that notice and comment procedures were not required under the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.*, since the changes advocated in the Baker-Mosbacher letter were predicated, *inter alia*, on the "international obligations of the United States, and the relevant aspects of U.S. policies regarding foreign relations, [and]... national security."[6] Moreover, because the Baker-Mosbacher letter attached importance to implementation of the modified criteria "as an immediate measure", we determined that a notice and comment rulemaking would be "impracticable, unnecessary and contrary to the public interest." 5 U.S.C. § 553(b)(B). Further, we noted that, since the definitions contained in the order with respect to "public switched service" and "private line service" were in the nature of an interpretive rule, a notice and comment rulemaking was not required. *See* 5 U.S.C. § 553 (b)(A).

4. Mr. Hobson does not challenge the substance of the *Separate Systems Modification* order, but requests that the Commission explain the departure from the notice and comment requirements of the APA. Mr. Hobson challenges the Commission's reliance on the APA's "foreign affairs" exemption as justification for not conducting a notice and comment rulemaking. Mr. Hobson argues that its use is appropriate only where matters so affect relations with other governments that a public rulemaking would "provoke definitely undesirable international consequences."[7] Alternatively, Mr. Hobson suggests that the order be revised so that it rests on the rulemaking record compiled in response to a petition for rulemaking filed by Pan American Satellite (PAS) requesting the elimination of all restrictions against separate satellite systems interconnecting with the public switched network.[8]

DISCUSSION

5. We dismiss Mr. Hobson's petition for lack of standing. Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405, provides, *inter alia*, that after a Commission order "any party thereto, or any other person aggrieved or whose interests are adversely affected" may petition for reconsideration. Section 1.106 (b)(1) of Commission's rules, 47 C.F.R. § 1.106 (b)(1), also provides that a petition for reconsideration may be filed by a party to the proceeding or by a person whose interests are adversely affected. In this instance, Mr. Hobson was not a party to this proceeding. Moreover, Mr. Hobson has failed to demonstrate that he is aggrieved by the Commission's action or that his interests have been adversely affected. Mr. Hobson's statement that he does not challenge the substance of the *Separate Systems Modification* order attests to this fact.

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[1] Permissible Services of U.S. Licensed International Communications Satellite Systems Separate from the International Telecommunications Satellite Organization (INTELSAT), 7 FCC Rcd 2313 (1992) (*Separate Systems Modification* order).

[2] No comments were received in response to Mr. Hobson's petition.

[3] Letter from James Baker, Secretary of State and Robert Mosbacher, Secretary of Commerce to FCC Chairman Alfred Sikes (November 27, 1991)(Baker-Mosbacher letter).

[4] Letter from George P. Shultz, Secretary of State, and Malcolm Baldridge, Secretary of Commerce, to FCC Chairman Mark Fowler (November 28, 1984).

[5] In the *Separate Systems Modification* order, we adopted an Executive Branch recommendation that the Separate Systems policy be modified to permit the provision of private lines interconnected with the PSN.

[6] *See* 5 U.S.C. § 553 (a)(1).

[7] *See* American Association of Exporters & Importers v. U.S., 751 F.2d 1239, 1249 (Fed. Cir. 1985); Carlisle Tire & Rubber Co. v. United States, 634 F. Supp. 419, 423 (CIT 1986).

[8] After the 1991 Executive Branch policy review was completed, PAS withdrew its petition.

ORDERING CLAUSES

6. Accordingly, IT IS ORDERED that the petition filed by James Hobson requesting reconsideration of the *Separate Systems Modification* order IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNICATIONS SATELLITE CORPORATION — File No. I-T-C-93-134

Application for authority to obtain units of utilization for INTELSAT and to establish channels of communications for the provision of point-to-multipoint Datanet service between the U.S. Mainland and the Commonwealth of Puerto Rico and between the U.S. Mainland and the U.S. Virgin Islands

ORDER AND AUTHORIZATION

Adopted: July 21, 1993; Released: July 30, 1993

By the Chief, International Facilities Division:

1. The Commission has under consideration an application filed by Communications Satellite Corporation (Comsat) requesting authority pursuant to Section 214 of the Communications Act of 1934, as amended, to establish channels of communications via INTELSAT satellites to connect an MCI hub earth station in Andover, Maine and earth stations located in the Commonwealth of Puerto Rico (Puerto Rico) and the U.S. Virgin Islands for the provision of point-to-multipoint Datanet service. GE American Communications, Inc. (GE Americom) filed a Petition to Deny in Part the application and Comsat filed an opposition.

2. In its application Comsat proposes to provide Datanet service to MCI as an extension of an existing international VSAT network utilized by one of its customers for data transmissions throughout Mexico, Latin America and the Caribbean. MCI plans to connect 120 separate locations in South America, Central America, Mexico and the Caribbean (including Puerto Rico and the U.S. Virgin Islands) via this VSAT network. Comsat notes that it is already authorized to provide international Datanet service required by MCI, and the addition of Puerto Rico and the U.S. Virgin Islands as part of the international network can be accomplished without having to lease more bandwidth capacity. Thus, Comsat states that it would serve no useful purpose to require MCI to lease separate satellite circuits, or employ separate earth station facilities, just to transmit to two offshore locations. Moreover, Comsat argues that use of domestic satellites alone is not technically feasible since domestic satellites cannot provide coverage of South America and their coverage of Mexico and Central America is problematic at best. Comsat notes that the INTELSAT system can provide a single satellite communications channel that will fully satisfy the needs of MCI and its customer. Since it anticipates that other customers will have similar requests in the future, Comsat urges the Commission to authorize it on a permanent basis to provide channels of communication for the provision of Datanet services to Puerto Rico and the U.S. Virgin Islands subject to the requirement that service to such offshore points be incidental to and part of an integrated international network.

3. GE Americom does not oppose a grant of the application. However, GE Americom seeks denial of that portion of the application that requests a grant of authority that would permit Comsat to provide international Datanet service to other customers having nodes in the U.S. Virgin Islands and Puerto Rico. According to GE Americom, such applications should be examined on a case-by-case basis to ensure that U.S. offshore services offered in each case are truly incidental to the international services via INTELSAT and that other points in a network are outside of the coverage area of U.S. domestic satellites. GE Americom notes that as long as related policy reasons require U.S. domestic satellites to submit individual applications for transborder services, even when these involve, as here, extensions of an existing network, it would be improper to free Comsat of similar obligations in the opposite situation. Although Comsat has proposed that the services be authorized subject to the requirement that the service be incidental to an integrated international network, GE Americom maintains that Comsat's customers would be free to establish data networks where service to the U.S. Virgin Islands and Puerto Rico is, in fact, primary and the international service incidental. Only through Commission evaluation on a case-by-case basis, asserts GE Americom, can a determination be made whether an international Datanet service is truly incidental.

4. In response to GE Americom's petition to deny in part, Comsat states that GE Americom has advanced no reason to suggest why Comsat would not adhere to the requirements of the Section 214 authorization it seeks. If it received the authorization as requested, Comsat states that service will be provided only to Puerto Rico and the U.S. Virgin Islands as part of an integrated international network with accompanying tariff restrictions. Comsat also questions GE Americom's reference to similar restrictions on applicants for transborder authority since such authorizations are general requests for authority no different than what Comsat is seeking.

5. Upon consideration of the application and comments, we find that authorization of Comsat's application to establish channels of communications, based on the specific circumstances and representations presented in its application, will serve the present and future public convenience and necessity. Comsat states that service to Puerto Rico will be provided to customers whose service requirements are primarily international. The Commission has previously recognized that, under certain circumstances, the use of a single satellite is the most efficient means of providing service to domestic and international points.

6. Under its Transborder policy, the Commission has recognized that the use of domestic satellites for the provision of certain international public telecommunications services on an incidental basis would serve the public

interest.[1] In such instances, the Commission has held that use of INTELSAT facilities to extend domestic networks to international locations within the footprint of a domestic satellite would be uneconomical and impractical because unnecessary duplication of facilities and a waste of the available radio spectrum would result.

7. The same principle is equally applicable here. The service Comsat proposes to provide to its customers in the instant application is primarily international in nature and could not be provided in its entirety by domestic satellite facilities. Under these circumstances, use of an INTELSAT satellite for the limited domestic service proposed would appear to be the most efficient and cost-effective means of providing service. Our finding that INTELSAT satellites may be used to provide domestic service on an incidental basis between the U.S. mainland and offshore U.S. points should not be construed as permitting the provision of purely domestic services via INTELSAT facilities.[2]

8. Although it favors granting applications involving service to offshore points on a case-by-case basis, GE Americom has not provided any persuasive justification which would outweigh the obvious advantages of a more flexible approach. GE Americom's fear that either Comsat or its customers may not adhere to restrictions on the use of the service is as unfounded as a general belief that all Commission licensees will violate the terms and conditions of their authorizations. Moreover, Comsat has indicated that it will have a tariff provision that will specify that service to offshore points via INTELSAT will be provided only if it is incidental to an integrated international network. Thus, any customer taking service pursuant to Comsat's Datanet tariff will be obligated to adhere to its terms or be subject to appropriate enforcement action by the Commission. There is also no basis for GE Americom's analogy to transborder applications. Although, domestic satellite providers initially filed transborder applications on a customer-by-customer basis, applicants now typically request authority on the broadest basis possible, which permits them to timely respond to service demands without the need for additional authority.

9. The case for allowing Comsat to provide service to other customers without filing applications on a case-by-case basis is compelling. Service via INTELSAT and other systems is typically authorized on a basis which allows for an applicant to serve other customers without seeking additional authorizations. In those instances, as here, we recognize that a case-by-case approach would increase burdens on common carriers seeking to provide similar services to other customers and on this Commission. Requiring a Section 214 application for each customer seeking to provide service to offshore U.S. points on an incidental basis would impede a carrier's ability to respond to customer needs in a timely fashion and would increase the burden upon this Commission in the form of additional unnecessary applications. We believe that where the parameters of the service are clearly defined, a carrier already authorized to provide that service on an incidental basis to an offshore U.S. point should be able to provide the same service to additional customers on the same basis without filing a Section 214 application each time.

10. Accordingly, IT IS ORDERED that application File No. I-T-C-93-134 IS GRANTED and Comsat is authorized to acquire units of satellite utilization from INTELSAT for the provision of Datanet service on an incidental basis, via INTELSAT AOR satellites, between the U.S. Mainland on the one hand and Puerto Rico and the U.S. Virgin Islands on the other hand.[3]

11. IT IS FURTHER ORDERED that this authorization is limited to the provision of Datanet service between the U.S. mainland and Puerto Rico and the U.S. Virgin Islands which is incidental to and part of primary international communications and that this requirement shall be reflected in Comsat's tariff.

12. IT IS FURTHER ORDERED that the Petition to Deny In Part filed by GE Americom IS DENIED.

13. This order is issued pursuant to Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4 (b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

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[1] Transborder Satellite Video Services, 88 FCC 2d 258 (1981); Satellite Business Systems, 88 FCC 2d 195 (1981); and American Satellite Company, 88 FCC 2d 178 (1981).

[2] The requirement that INTELSAT space segment be used for "incidental" service to offshore U.S. points does not apply to those U.S. offshore points which are not served by U.S. domestic satellites.

[3] It should be noted that the customers' earth stations must have appropriate Title III authority to communicate with the INTELSAT system.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-31

In the Matter of

Amendment of Section 73.202(b), RM-8162
Table of Allotments,
FM Broadcast Stations.
(Crescent North, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 9, 1993; Released: July 30, 1993

By the Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 8 FCC Rcd 1381 (1993), issued in response to a petition filed on behalf of William E. Stamps, Sr. and Patricia R. Stamps, d/b/a Let's Talk Radio ("petitioner"), licensee of Station KPOD-FM, Channel 250C3, Crescent North, California, proposing the substitution of Channel 250C2 for Channel 250C3 and modification of the license accordingly to specify the higher class channel. Petitioner filed supporting comments reiterating an intention to apply for Channel 250C2, if it is allotted to Crescent North. No other comments were received.

2. We believe the public interest would be served by substituting Channel 250C2 for Channel 250C3 at Crescent North, since it could provide an enhanced service to the community. Therefore, in accordance with the provisions of Section 1.420(g) of the Commission's Rules, we will substitute Channel 250C2 for Channel 250C3 and modify the license of Let's Talk Radio for Station KPOD-FM, as requested. As indicated in the *Notice*, Channel 250C2 can be allotted to Crescent North in conformity with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules at the petitioner's specified site.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 13, 1993**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to Crescent North, California, as follows:

City	Channel No.
Crescent North, California	250C2

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Let's Talk Radio (BLH-890216KD) for Station KPOD-FM, IS MODIFIED to specify operation on Channel 250C2 in lieu of Channel 250C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Let's Talk Radio, licensee of Station KPOD-FM, is required to submit a rule making fee in addition to the fee required for the applications to effectuate the upgrade at Crescent North, California.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Coordinates at the reference site for Channel 250C2 at Crescent North are 41-48-25 and 124-10-16.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-252

In the Matter of

Amendment of Section 73.202(b), RM-7650
Table of Allotments,
FM Broadcast Stations.
(Opelousas and Berwick,
Louisiana)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 9, 1993; Released: July 30, 1993

By the Chief, Allocations Branch:

1. At the request of Cavaness Broadcasting, Inc. ("petitioner"), licensee of Station KVOL-FM, Channel 290A, Opelousas, Louisiana, the Commission has before it the *Notice of Proposed Rule Making and Order to Show Cause*, 6 FCC Rcd 5080 (1991) (*"Notice"*), proposing the substitution of Channel 290C3 for Channel 290A at Opelousas and the modification of Station KVOL-FM's license to specify operation on the higher class channel. In order to accommodate petitioner's proposal, an *Order to Show Cause* was issued to Mary Frances Doiron ("Doiron"), licensee of Station KVPO-FM, Berwick, Louisiana, proposing the substitution of Channel 295A for Channel 290A and the modification of Station KVPO-FM's license to specify operation on the alternate Class A channel. Petitioner filed comments reiterating its intention to apply for Channel 290C3 and to reimburse the licensee of Station KVPO-FM for the reasonable costs associated with the change in channel at Berwick. No other comments were filed.

2. The *Notice* stated that Channel 290C3 could be allotted at Opelousas in compliance with the Commission's minimum distance separation requirements at the petitioner's desired site. We also stated that petitioner's proposal was in the public interest since it would enable Station KVOL-FM to expand its coverage area. However, we noted that Station KVOL-FM's upgrade, which included Station KVPO-FM changing to Channel 295A at Berwick, was contingent upon Station KCIL-FM at Houma, Louisiana, receiving a license to operate on Channel 298C1 in accordance with the site specified in its construction permit (File No. BPH-901026JQ).

3. Commission records show that since the time the *Notice* was released, the construction permit for Station KCIL-FM has been cancelled. Our engineering analysis further shows that there are no alternate channels available for use at Berwick, Louisiana. Therefore, we are compelled to deny petitioner's proposal, since the allotment of Channel 295A at Berwick is short-spaced to the licensed operation of Station KCIL-FM on Channel 298C1 at Houma.[1]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That the petition filed by Cavaness Broadcasting, Inc. (RM-7650) IS DENIED.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Although Doiron did not file comments in response to the *Order to Show Cause*, its channel substitution is now moot in light of our determination herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-217

In the Matter of

Amendment of Section 73.202(b), RM-8286
Table of Allotments,
FM Broadcast Stations.
(Grand Gorge, New York)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 13, 1993; Released: July 30, 1993

Comment Date: September 20, 1993
Reply Comment Date: October 5, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Sound of Life, Inc. ("petitioner"), requesting the allotment of Channel 287A to Grand Gorge, New York, as the community's first local service. Petitioner states that it will apply for the channel, if allotted.

2. Section 307(b) of the Communications Act of 1934, as amended, mandates that the Commission fairly, equitably, and efficiently distribute frequencies " . . . among the several States and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or is listed in the U.S. Census, that is sufficient to demonstrate its status. Grand Gorge is not listed in the U.S. Census. According to the petitioner, Grand Gorge is located in the Catskill mountain region and has a population of 950 persons, according to the 1993 *Rand McNally Commercial Atlas and Marketing Guide*.[1] Petitioner also states that Grand Gorge has its own post office, fire department and sewage treatment plant. In addition, it contends that there is an animal hospital, hardware store and pharmacy which identify themselves with the community by name. Petitioner admits that Grand Gorge has been combined with the town of Roxbury, which is eight miles distant, for governance, but submits that this fact is not dispositive for allotment purposes. While petitioner has stated that there are local businesses, churches and a school, it has not specifically identified these entities with addresses or shown that they are intended to serve Grand Gorge, as opposed to other areas. This is a critical deficiency because we have, in the past, rejected claims of community status where a nexus has not been shown between the political, social and commercial organizations and the community in question. *See Gretna, Marianna, Quincy and Tallahassee, Florida*, 6 FCC Rcd 633 (1991), and cases cited therein. Therefore, the petitioner should present the Commission with sufficient information to demonstrate that Grand Gorge has social, economic, cultural, or governmental indicia to qualify it as a "community" for allotment purposes. See, *e.g., Beaver Springs, Pennsylvania*, 4 FCC Rcd 5373 (1989), *Sargent, Nebraska*, 4 FCC Rcd 3933 (1989), *Bartow, Georgia, et al.*, 4 FCC Rcd 6876 (1989), *East Hemet, California, et al.*, 4 FCC Rcd 7895 (1989), and *Ellwood, California*, 50 Fed. Reg. 13031, published April 2, 1985.

3. We believe the public interest would be served by seeking further comment on petitioner's proposal because the allotment of Channel 287A could provide Grand Gorge with its first local service, if ultimately found to be a community for allotment purposes. Channel 287A can be allotted to Grand Gorge in compliance with the Commission's minimum distance separation requirements with a site restriction of 11.2 kilometers (6.9 miles) northeast to avoid a short-spacing to Station WYCY, Channel 287A, Hawley, Pennsylvania.[2] Canadian concurrence in the allotment is required since Grand Gorge is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Grand Gorge, New York	--	287A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **September 20, 1993,** and reply comments on or before **October 5, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Russell C. Powell, Esq.
Taylor Thiemann & Aitkin
908 King Street, Suite 300
Alexandria, Virginia 22314
(Counsel to petitioner)

[1] We recognize that Grand Gorge is listed in the 1993 Rand McNally Commercial Atlas and attributed with a population of 950 people. However, mere geographical location is not sufficient to establish "community" status. *See, Vimville, Mississippi*, 48 FR 5974 (1983), *Hannibal, Ohio*, 6 FCC Rcd 2144 (1991), and *Columbia, California*, 56 FR 26357 (1991), 6 FCC Rcd 3292 (1991).

[2] The coordinates for Channel 287A at Grand Gorge are North Latitude 42-26-39 and West Longitude 74-24-54.

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-10

In the Matter of

Amendment of Section 73.202(b), RM-8150
Table of Allotments,
FM Broadcast Stations.
(Paris, Tennessee)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 13, 1993; Released: July 30, 1993

By the Chief, Allocations Branch:

1. At the request of Benton-Weatherford Broadcasting, Inc. of Tennessee ("petitioner"), permittee of Station WMUF-FM, Channel 231A, Paris, Tennessee, the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 770 (1993), proposing the substitution of Channel 231C3 for Channel 231A at Paris and modification of petitioner's construction permit for Station WMUF-FM to specify operation on the higher powered channel. Petitioner filed comments restating its interest to apply for Channel 231C3, if allotted.[1] No other comments were received.

2. We believe the public interest would be served by substituting Channel 231C3 for Channel 231A at Paris, since it could provide the community with a wide coverage area FM service. Channel 231C3 can be allotted to Paris in compliance with the Commission's minimum distance separation requirements with a site restriction of 17.2 kilometers (10.7 miles) northeast to accommodate petitioner's desired site.[2] However, the issuance of a license for Channel 231C3 may be withheld until Station WIST-FM, Lobelville, Tennessee is licensed on Channel 233C2 in accordance with its outstanding construction permit (File No. BMPH-920325IC).[3] As proposed, we will also modify Station WMUF-FM's authorization to specify operation on Channel 231C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 13, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Paris, Tennessee	231C3, 288A

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Benton-Weatherford Broadcasting, Inc. of Tennessee for Station WMUF-FM, Paris, Texas, IS MODIFIED to specify operation on Channel 231C3, in lieu of Channel 231A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Benton-Weatherford Broadcasting, Inc. of Tennessee, permittee of Station WMUF-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

6. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to Sundance Communications, Inc. P.O. Box 460, Lobelville, Tennessee 37097 (licensee of Station WIST-FM).

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

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[1] Although untimely filed, we will consider petitioner's comments in light of the fact that acceptance of petitioner's expression of interest would not require the denial or dismissal of another timely filed proposal for use of the spectrum. In addition, as stated in the *Notice*, since petitioner failed to include an affidavit verifying its statements, the petitioner was requested to comply with the requirements of Section 1.52 of the Commission's Rules. In response, petitioner submitted an affidavit, thus, its initial failure to fulfill all subscription and verification requirements has been remedied.

[2] The coordinates for Channel 231C3 at Paris are North Latitude 36-22-40 and West Longitude 88-09-20.

[3] Station WIST-FM was modified from Channel 213A to Channel 233C2 in MM Docket No. 88-22. *See* 3 FCC Rcd 6319 (1988). Therefore, Station WIST-FM is no longer entitled to protection for its former Channel 231A. *See Plainview, Texas*, 4 Fcc Rcd 8788 (1989). We will serve the licensee of Station WIST-FM with a copy of this *Report and Order*.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 93-129

In the Matter of

800 Data Base Access Tariffs and the
800 Service Management System Tariff

ORDER DESIGNATING ISSUES FOR INVESTIGATION

Adopted: July 19, 1993; Released: July 19, 1993

By the Acting Chief, Common Carrier Bureau:

I. INTRODUCTION

1. This Order designates the issues we will investigate in this docket. We initiated this docket to investigate tariff filings by the local exchange carriers (LECs) which introduce a new rate structure for 800 access service. Under earlier network technologies, LECs used their central office switches to process 800 calls. When a caller placed an 800 call, the LEC's central office was equipped to identify the IXC to whom the dialed 800 number was assigned and route the call accordingly. Under 800 data base technology, the 800 call goes through the originating LEC's local exchange switches until it reaches a switch that is equipped as a Service Switching Point (SSP). The SSP suspends the call and sends a query over the SS7 network to one of the regional Service Control Points (SCP). SCPs are data bases which contain routing instructions for 800 numbers, including identification of the IXC to whom the call should be routed. If the data base query requests only information identifying the IXC for the call, the LEC provides only "basic" query service to the IXC and charges its basic query rate.[1] If the data base query also requests more sophisticated routing instructions, (*e.g.*, an IXC specification that varies by time of day), the LEC provides "vertical features" to the IXC for which additional charges may apply.[2] The SCP then returns routing instructions to the SSP. Upon receipt of the routing instructions, the SSP routes the call to the appropriate IXC. The IXC can then query its own data base to convert the 800 number into a plain old telephone service (POTS) number or provide more sophisticated routing features, including some of the capabilities the LECs offer as vertical features.

2. There are a variety of arrangements through which LECs have fulfilled their obligation to provide 800 data base query service. LECs can either own SCPs[3] or purchase query service from another LEC. LECs can also arrange to route their 800 calls to another LEC's network which is equipped with SSPs.

3. The system described above constitutes the network that is directly involved in processing 800 calls. Additional facilities are required to load the proper customer information and routing instructions into each regional SCP. This is accomplished through the 800 Service Management System (SMS/800), a single centralized data base into which all customer records and routing instructions for 800 numbers are loaded. The SMS/800 data base is owned by the Bell Operating Companies and access to it is limited to entities called Responsible Organizations (RESPORGs), which can enter the SMS/800 data base to do such things as reserve new numbers or change carrier assignments. RESPORG functions may be performed by LECs, IXCs or other qualified entities.

4. The LECs' offerings of 800 data base query service and the Bell Operating Companies' (BOCs) joint offering of services through the SMS/800[4] were established in tariffs filed by March 5, 1993. The affected carriers[5] filed tariffs to establish charges for both basic query services and vertical features. In addition, the BOCs filed the tariff to govern access by RESPORGs to the SMS/800, the centralized administrative data base for 800 services.[6] In the *800 Data Base Access Tariff Order* the Common Carrier Bureau (Bureau) suspended the subject transmittals for one day, imposed accounting orders and initiated investigations of the LECs' 800 data base query tariffs and the BOCs' SMS/800 tariff. Subsequently, some LECs have revised their 800 data base query rates, for either basic or vertical services, in their annual access tariff filings and those revisions have been added to this investigation.[7]

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[1] "Basic" query service includes the capability to divide traffic to a single 800 number to multiple IXCs, based on the local access transport area (LATA) from which the traffic originates. This basic query service merely routes the 800 call to the correct IXC.

[2] "Vertical features" include the translation of the 800 number into a plain old telephone service (POTS) number or routing the traffic from a single 800 number to different customer service centers or different IXCs based on factors such as the time of day or a percentage allocation of traffic. IXCs can perform some of these vertical features in their own networks.

[3] Ten LECs filed tariffs as SCP owners.

[4] The SMS/800 service was established in the *Bell Operating Companies' Tariff for the Service Management System*, Tariff F.C.C. No. 1, Transmittal No. 1. This tariff was jointly filed by Ameritech Services Company, The Bell Atlantic Telephone Companies, BellSouth Telecommunications, Nevada Bell, Pacific Bell, The NYNEX Telephone Companies, Southwestern Bell Telephone Company and US West Communications. Transmittal No. 1 took effect subject to the investigation in the *Bell Operating Companies' Tariff for the 800 Service Management System and 800 Data Base Access Tariffs, Order*, 8 FCC Rcd 3242 (Com. Car. Bur., April 28, 1993) (*800 Data Base Access Tariff Order*).

[5] Carriers filing tariffs establishing data base 800 services are listed in Appendices B and C of the *800 Data Base Access Tariff Order*.

[6] The BOCs amended the SMS/800 Tariff by filing Transmittal No. 2 on April 8, 1993 and Transmittal No. 3 on April 23, 1993. Transmittal 3 was filed under a Special Permission which allowed it to go into effect on short notice on May 1, 1993. MCI and Sprint filed petitions on April 30, 1993, protesting some aspects of the revisions in Transmittal 3.

[7] *See, 1993 Annual Access Tariff Filings, Memorandum Opinion and Order*, DA 93-762, at ¶ 114 (Com. Car. Bur. June 23, 1993) (*1993 Annual Access Order*).

II. ISSUES DESIGNATED FOR INVESTIGATION

5. The Bureau's investigation will address the following issues with regard to the 800 data base tariffs. The summary of relevant comments following each issue provides specific examples of matters that parties are free to address in their comments on that issue.

A. Terms and Conditions

Issue 1. The degree of clarity with which the LEC 800 data base tariffs describe the services offered.

6. These tariffs reflect the implementation of a new technology to deliver 800 data base access service. Thus, they introduce a variety of new terms and conditions that raise questions of reasonableness. For example, petitioners argue that some LECs fail to state clearly that basic 800 query service includes area of service routing at the LATA level.[8] Petitioners claim that the LECs do not clearly describe when a LEC may charge for a query when the associated call is not delivered to the IXC. They also argue that tariff provisions on this question are not uniform among the LECs. Petitioners argue that, because of the ambiguities in the descriptions contained in some tariffs, some LECs may be able to market vertical features directly to end users, in contravention of the Commission's Order in CC Docket No. 86-10.[9] Petitioners further argue that at least one tariff could be interpreted to require customers to take RESPORG service in order to obtain vertical features. We request comments on the reasonableness of limits in the SMS/800 tariff on the quantity of 800 numbers that a RESPORG can reserve for future use and what, if any, reservation policy should apply.[10] We invite interested parties to comment on whether terms and conditions such as those described above, which appear in the 800 data base tariffs, are consistent with the Communications Act and with the Commission's Orders in CC Docket No. 86-10.

Subissue: Should the LECs include RESPORG services in their 800 data base tariffs?

7. The Commission has ruled that entities other than LECs and IXCs may act as RESPORGs if they meet the minimum qualification standards set forth in the SMS/800 tariff and the guidelines that are incorporated into it.[11] Some LECs[12] have included terms, conditions, and rates in their 800 access tariffs for the RESPORG services they will be providing. The petitioners argue that RESPORG services are not required to be tariffed under Title II of the Communications Act and therefore should not be tariffed by the LECs. We invite interested parties to comment on whether such services may properly be included in access tariffs.

B. 800 Data Base Query Tariffs - Price Cap Carriers

Issue 2. The reasonableness of the methods used by the price cap LECs to restructure their traffic-sensitive baskets, while adjusting for exogenous costs.

8. The price cap LECs generally employ either of two methods for restructuring the traffic-sensitive basket and calculating the exogenous change permitted by the *800 Data Base Access Order*. Some LECs perform the restructure first, while other LECs calculate the exogenous change first. Both methods are described below.

9. As to exogenous costs, the price cap rules require that, when the price cap index (PCI) for the traffic-sensitive basket is adjusted to include the effects of exogenous costs, the upper and lower pricing bands for all service categories within the traffic-sensitive basket are adjusted by a percentage amount equal to the percentage adjustment in the PCI.[13] The service bands limit category pricing flexibility, as reflected in the category service band index (SBI). For restructures, the price cap rules require carriers to determine the levels of demand for the restructured rate elements. Rate levels for the restructured rate elements that produce a new SBI for the restructured category which falls within the upper and lower service bands applicable to that category are presumptively lawful. When a carrier files rate revisions that produce a new SBI which falls outside the service bands, the filing must be accompanied by additional supporting materials. *See*, Section 61.49 (b), (c) and (d) of the Commission's Rules, 47 C.F.R. § 61.49 (b), (c) and (d).

10. In the instant context, the effect of complying with these requirements of the price cap rules will vary depending upon the order in which the carrier performs the calculations required under the rules. Since the Commission's rules do not specifically address the proper sequence for compliance when both the exogenous adjustment rules and the restructure rules are triggered simultaneously for a new service category within a basket, we will investigate whether carriers have reasonably interpreted and applied our rules in complying with the requirements of CC Docket No. 86-10. Our concern in evaluating methods is whether one approach or another has an adverse impact on the reasonableness of rate levels or rate flexibility or otherwise is contrary to the purposes sought to be achieved by the price cap rules.

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[8] This feature allows a customer to divide the traffic to a single 800 number among two or more IXCs geographically, based on the LATAs in which the calls originate.

[9] *Provision of Access for 800 Service, Notice of Proposed Rulemaking*, 102 FCC 2d 1387 (1986); *Supplemental Notice of Proposed Rule Making*, 3 FCC Rcd 721 (1988); *Report and Order*, 4 FCC Rcd 2824 (1989); *Memorandum Opinion and Order on Reconsideration and Second Supplemental Notice of Proposed Rulemaking*, 6 FCC Rcd 5421 (1991); *Order*, 7 FCC Rcd 5197 (1992) (*Sprint Petition Order); Order*, 7 FCC Rcd 8616 (1992) (*Ad Hoc Petition* Order); *Second Report and Order*, CC Docket 86-10, 8 FCC Rcd 907 (1993) (*Rate Structure Order); Memorandum Opinion and Order on Further Reconsideration*, 8 FCC Rcd 1038 (1993); *Order*, 8 FCC Rcd 1423 (1993) (*Comptel Petition Order); Order*, 8 FCC Rcd 1844 (1993) (*Second Sprint Petition Order*).

[10] The SMS/800 tariff allows a RESPORG to reserve a maximum of 3,000 numbers or 15% of its total quantity of working 800 numbers, whichever is greater. *See*, Bell Operating Companies' Tariff F.C.C. No. 1, Transmittal No. 1, Section 2.3.1 (A)(4).

[11] *Comptel Petition Order*, 8 FCC Rcd 1423, 1428-1429.

[12] *See, e.g.*, ARINC Petition at 11, n.22 (says that Ameritech, BellSouth and NYNEX each tariffed their RESPORG services).

[13] *See* Section 61.47 of the Commission's Rules, 47 C.F.R. § 61.47.

Method 1 - Restructure First

11. United, for example, performs the restructure and exogenous change in the following manner. First, United restructures its traffic-sensitive basket to establish the new 800 data base category. The 800 data base rate is set at the level required to recover the 800 data base exogenous costs. Next, for all the other categories in the traffic sensitive basket (local switching, local transport and information), rates are reduced by the amount of the revenue associated with the 800 data base service category. United does not adjust the SBIs to reflect the rate reductions for these existing categories. The SBI for the 800 data base category is set equal to the current actual price index (API) for the traffic-sensitive basket with upper and lower limits set at plus and minus 5 percent.

12. Next, pursuant to the rules for exogenous cost adjustments, United increases the basket PCI based on the 800 data base exogenous costs and pursuant to price cap rules, increases SBI upper and lower limits for all service categories, including the new 800 data base category.

13. Finally, United uses the upward pricing flexibility afforded by the SBI upper limit to raise the rates for the original service categories back to their original levels and increases the SBIs and the API accordingly.

14. The resulting API has the same relationship to the new PCI as initially existed between the API and PCI. For each of the service categories there appears to be minor changes in the relationships between the SBI and its upper and lower limits.

Method 2 - Exogenous Change First

15. Some carriers first make their adjustments for exogenous costs and then restructure their traffic-sensitive basket to establish a new service category for 800 data base services. Although there are minor differences in the exact method used by each carrier, Ameritech provides a good example of the general method. Ameritech performs the exogenous change calculation and the restructure in the following manner.

16. First, the PCI is adjusted to reflect the change in exogenous costs. Next, SBI upper and lower limits for each of the original service categories are adjusted to reflect the change in the PCI. As a result, in some cases, the existing SBI may be below the new lower limits.[14] The 800 data base category SBI is initialized at 100 with upper and lower limits set at plus and minus 5 percent.

17. Finally, the API is increased to reflect the additional revenue in the traffic sensitive basket attributable to including the 800 data base revenue. For most companies that use this method, the increase in the API equals the increase in the PCI.[15]

Method 3 - Alternative Method

18. An alternative method to those described above is as follows. The PCI is adjusted to reflect the change in exogenous costs. There is no adjustment to the existing rates, the existing SBIs, or the SBI upper and lower limits.

19. The 800 data base category is initialized to recover the full 800 data base exogenous amount. The API is increased to reflect the increase in traffic-sensitive basket revenue due to the newly included 800 data base revenues and the SBI for 800 data base is initialized at either 100 or the API for the basket.[16] The SBI upper and lower limits are set at the API plus and minus 5 percent.

Discussion

20. We believe there are advantages and disadvantages to each of these methods. The problems encountered by each method arose because the mechanics of adding a new service category as part of a restructure, while making an exogenous adjustment to the overall basket PCI, was never specifically addressed by the price cap rules.

21. Method 1 arguably violates the price cap rules because there is no downward SBI adjustment at the time of the restructure to reflect reductions in the rates for the original categories. *See* Section 61.47 of the Commission's Rules, 47 C.F.R. § 61.47. The advantage of using this method, however, is that implementation of 800 data base rates results in only minor changes in pricing flexibility within the original service categories.

22. Method 2 appears to comply with price cap rules, but has the effect of raising the upper and lower limits of the existing service category, thus creating in existing categories significant pricing flexibility opportunities that were not available prior to the restructure.

23. Method 3 arguably complies with price cap rules concerning index adjustments to reflect exogenous changes,[17] and results in an intuitively reasonable outcome. For instance, the rates, indices and limits for existing categories do not change, therefore preserving the existing degree of pricing flexibility.

24. In order to determine (1) whether each of the two methods LECs use are consistent with price cap rules and policies; (2) if so, whether one method is preferable; and (3) whether an alternative method is preferable, the parties should comment on each of the three methods. In particular, parties should comment on (1) the effect of each method on pricing flexibility; (2) whether the method complies with price cap rules and (3) whether any of these three methods requires a price cap rule waiver.

Issue 3. The reasonableness of the price cap LECs' 800 data base rates.

Subissue: Are the exogenous costs claimed by the price cap LECs reasonable?

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[14] Using this method, Ameritech, NYNEX and US West each raised their SBI lower limit above their respective SBI for their information categories.

[15] Ameritech does not set 800 data base rates at the full exogenous cost amount. Therefore, the increase in the API is not equal to the increase in the PCI.

[16] Whether the 800 data base SBI is initialized at 100 or at the API is purely a formal indexing issue. Use of one or the other makes no difference with respect to prices or pricing flexibility for the 800 data base category or any other category in the traffic sensitive basket. If the 800 data base SBI is initialized at the API, the weighted average of the SBIs for all categories will be equal to the API for the basket. If, however, the 800 data base SBI is initialized at 100, the weighted average of the SBIs will not equal the API. Parties should comment on whether initialization at 100 or at the API is preferable.

[17] *See* Section 61.47 of the Commission's Rules, 47 C.F.R. § 61.47.

25. Exogenous cost adjustments, which can increase a LEC's PCI, were recognized by the Commission as an exception to the incentive structure of price caps. The Commission identified with specificity those extraordinary cost changes enumerated in Section 61.45 (d) of the Commission's Rules, 47 C.F.R. § 61.45 (d), which the Commission would treat as exogenous and therefore warranting adjustment of carriers' PCIs. For the costs of implementing data base 800 technology, the Commission's *Rate Structure Order* stated that:

> [E]xogenous treatment will only extend to those costs incurred specifically for the implementation of basic 800 data base service. Those costs which are not reasonable and which are not specifically incurred for the implementation and operation of the 800 data base system, such as core SS7 costs, will not be afforded exogenous cost treatment. Nor will the costs of accelerating SS7 deployment to meet our implementation timetable be granted exogenous treatment. We anticipate that exogenous treatment will be accorded to those costs associated with: Service Control Points (SCPs), the Service Management System (SMS), and links between SCPs and the SMS, as well as between Signal Transfer Points (STPs) and SCPs, to the extent such costs are directly attributable to 800 data base service. Other expenses may also qualify for exogenous treatment, but as with all these requests for exogenous treatment, the burden is on the LECs to demonstrate that such additional costs are incurred specifically for the implementation of basic 800 data base service.[18]

26. The Bureau has previously observed in the *800 Data Base Access Tariff Order* that it was improper for the LECs to include overhead in the calculations of their exogenous costs. Therefore, the Bureau concluded that LECs that had claimed exogenous treatment for such costs must recalculate their price cap indexes (PCIs) to reflect the exclusion of such costs. No suspension of the transmittals was required, pending final resolution of the issue in this investigation, because no API exceeded the recast PCI.[19] However, LECs that wish to continue to assert claims for including overhead in their calculation of exogenous costs must proffer justifications in their direct cases.

27. We also invite interested parties to address whether the other exogenous costs claimed by the LECs are reasonable and consistent with the price cap rules[20] and CC Docket 86-10. Some petitioners argue that some LECs have claimed exogenous treatment for inappropriate costs. For example, petitioners protest the LECs' claims for exogenous treatment for such costs as SSP hardware and/or software, tandem upgrades, repair centers for 800 service and STPs. Petitioners also protested some LECs' claims that the costs of some transmission links were exogenous even though the Commission's previous orders did not contemplate such treatment. They argue that some costs should be disallowed because they were incurred to meet the Commission's access time standards, not to institute 800 data base service. Petitioners also question whether the LECs should be allowed exogenous treatment for SMS/800 expenses they paid.[21] Petitioners were particularly concerned about whether the manner in which some LECs had levelized the demand used to calculate their exogenous costs had distorted those amounts. Petitioners argue that the LECs did not properly allocate shared costs both among services (*i.e.*, 800 data base service and LIDB, basic and vertical query service) and between jurisdictions (interstate and intrastate). Other petitioners allege that the SMS/800 costs claimed by the BOCs to support their 800 data base query rates were not derived in compliance with the Commission's affiliate transactions rules.

28. Some LECs have used the Common Channel Signalling Cost Information System (CCSCIS) or a similar computer model to apportion common costs to 800 data base service. Additionally, at least one LEC has also used the Switching Cost Information System (SCIS) to develop some of the costs for these services.[22] Other LECs[23] were able to identify exogenous costs for basic 800 query charges without reliance on such models. Petitioners argue that these models should be disclosed on the public record in this proceeding if the LECs plan to rely on them to develop cost support for the rates at issue in this proceeding.

29. In the present proceeding, price cap LECs using computer models to develop costs in their direct cases must disclose those models on the record if their justification for their rates is based on the use of the model.[24] If a carrier prefers not to disclose the model it used to allocate costs, it

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[18] *Rate Structure Order*, 8 FCC Rcd at 911.

[19] *800 Data Base Access Tariff Order*, 8 FCC Rcd at 3244.

[20] *Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order*, 5 FCC Rcd 6786 (1990) and *Erratum*, 5 FCC Rcd 7664 (1990) (*LEC Price Cap Order); modified on recon.* 6 FCC Rcd 2637 (1991); *petitions for further recon. dismissed*, 6 FCC Rcd 7482 (1991); *upheld on appeal, National Rural Telecom Association v. FCC*, Nos. 91-1300, 91-1303, 91-1304 and 91-1326, slip op. (D.C. Cir. Mar. 26, 1993); *further modified on recon., Report and Order on Further Reconsideration and Supplemental Notice of Proposed Rulemaking*, 6 FCC Rcd 4524 (1991) (*Part 69 ONA Order); petitions for recon. of Part 69 ONA Order pending, appeal docketed, D.C. PSC v. FCC*, No. 91-1279 (D.C. Cir. June 14, 1991).

[21] *See*, MCI Petition at 14 (LECs should be required to demonstrate that these costs are reasonable and not duplicative of costs to be recovered through RESPORG access).

[22] *See* Ameritech Reply at 10.

[23] *See, e.g.*, Pacific Reply at 6 (did not use CCSCIS to develop exogenous costs, or the restructured rate for basic 800 service, only to allocate costs to the new vertical feature services); Southwestern Bell Reply at 16 (not necessary for Southwestern Bell to use data from either the CCSCIS or SCIS-IN models in developing the basic 800 query cost, used CCSCIS to develop costs for one vertical feature).

[24] The LECs that oppose disclosure of the CCSCIS model rely on the Commission's previous decision not to require public disclosure of the SCIS model in the ONA tariff investigation. *Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Tariffs, Memorandum Opinion and Order*, 7 FCC Rcd 1526 (1992). A fundamental basis for the decision to allow the LECs in that case to use a cost model that was not fully disclosed on the record was the Bureau's determination that the use of such a model was necessary to develop unit investment data for individual basic service elements because of the unique nature of those elements and the switching and related facilities used to provide them. *Id.* at 1533, 1536. Since, in the present proceeding, two LECs were able to develop costs for 800 data base service without such computer models, LECs do not need to rely exclusively on such a model for this

must provide some other justification for its rates. Carriers are free to develop their exogenous costs by other methods, provided that those methods are disclosed on the record.

Subissue: Have the LECs used reasonable rate making methodologies in developing their basic query rates?

30. The carriers' 800 query charges must be established as a restructure under our price cap rules. As part of the showing required to justify restructured rates, carriers must demonstrate the reasonableness of the demand assumptions used to develop those rates. For 800 query charges, most of the price cap LECs developed their rates primarily by dividing their exogenous costs by their estimated demand. Petitioners challenge the adequacy and accuracy of the demand assumptions on which the LECs based their basic query rates. We invite interested parties to comment on these issues.

31. To assist in our resolution of these issues related to the reasonableness of rates, we require the price cap LECs specified in Appendix A to provide the information requested therein.

Subissue Have the LECs used reasonable rate making methodologies in developing their vertical features rates?

32. For vertical features, price cap LECs are required to provide cost support material that satisfies the requirements for new service offerings set forth in the *Part 69 ONA Order*, as modified.[25] Petitioners questioned the adequacy of the cost support for some of the assumptions underlying the LECs' rates, such as demand figures, depreciation and tax expense used in developing their rates for these services.[26]

33. To assist in our resolution of these cost support issues, we require the price cap LECs specified in Appendix A to provide the information requested therein.

C. 800 Data Base Query Tariffs - Rate of Return Carriers

Issue 4. The rate of return LECs' role in providing the services offered in their tariffs.

34. There are a variety of interconnection architectures that the LECs use to handle 800 data base queries. Some LECs do not own SSPs and are therefore unable to suspend the processing of an 800 call and initiate a query to the SCP, where the routing instructions for the 800 number are contained, for an 800 call which originates in their service area. Those carriers may choose instead to route 800 calls to a neighboring LEC equipped with the requisite facilities to query the 800 data base. In some of these cases, the originating LEC has nevertheless filed a tariff for 800 data base query charges. While the originating LEC is free to bill the IXC for the charges associated with both its services and those of the neighboring LEC who provides the 800 query service, we invite parties to address whether the originating LEC may properly establish tariffed charges for the query service when the neighboring LEC who provides the service also has charges for the service in its tariff.

Issue 5: Query and vertical features rate development.

Subissue: Do these tariffs properly flow through changes in LEC costs of providing basic query service and vertical features?

35. Many LECs who do not own SCPs purchase query service from another LEC and then resell it. Some of these carriers can use SS7 network facilities to initiate a query to an SCP owned and maintained by another LEC. Since March 5, 1993, there have been several reductions in the basic query and vertical features rates that the SCP owners charge. Petitioners have argued that the non-SCP owner LECs have not, in all cases, properly flowed through the reductions in their costs. In their direct cases, LECs who do not own SCPs but initiate queries as part of their 800 call processing must address whether reductions in the tariffed rates of the SCP owners require reductions in the tariffed rates of non-SCP owners.

Subissue: Have the rate of return LECs properly stated the demand on which their query rates are based?

36. Several LECs have adjusted their demand, when calculating their rates, to exclude an estimated number of unbillable queries. These LECs estimate that they will be unable to collect for up to 20% of the queries that originate from their service areas, possibly because they are unable to bill some IXCs. They propose to adjust their demand figure, the net effect of which will be that those costs are recovered in the rates for the billable queries. Petitioners question the validity of the methods used by some rate of return LECs to estimate the percentage of queries that will be unbillable. In their direct cases, these LECs must demonstrate that such adjustments are warranted and that their demand estimates are reasonable.

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service. Therefore, neither the carriers nor the Commission is faced with the limitation on cost development that prompted reliance on the SCIS model in the ONA tariff investigation. Moreover, given the particular services and facilities at issue in the ONA investigation, the data used to develop and exercise the SCIS model included information proprietary to entities other than the filing carriers. Therefore, some confidential treatment of the SCIS model was justified. Those services, and the facilities used to deliver those services, are not at issue here.

[25] *Part 69 ONA Order*, 6 FCC Rcd 4524.

[26] The LECs argue that their cost allocation factors used to apportion costs to and among vertical features are proper, even when they result in a zero incremental rate for vertical features. We ask for comment on whether vertical features require the LECs to use more complex and thus more costly hardware, or software functions, than those used for basic queries and whether those differences have any rate implications.

Issue 6. Reasonableness of CCSCIS cost allocations.

37. Some rate of return LECs have used the Common Channel Signalling Cost Information System (CCSCIS) or a similar computer model to apportion the investment associated with providing 800 data base service in order to develop investment-based costs. In the present proceeding, rate of return LECs that use computer models to develop investment-based costs in their direct cases must disclose those models on the record if their justification for their rates is based on the model.[27] If a carrier prefers not to disclose the model it uses to allocate costs, it must provide some other justification for its rates. Carriers are free to develop their costs by other methods, provided that those methods are disclosed on the record.

38. To assist in our resolution of these issues, we require the rate of return LECs listed in Appendix B to provide the information requested in that appendix.

D. SMS/800 Data Base Tariff

Issue 7. Terms and conditions in the BOC SMS/800 tariffs

39. The SMS/800 is a centralized data base that administers the customer records, carrier identification and routing instructions for virtually all domestic 800 numbers. The SMS/800 tariff was jointly filed by the seven BOCs[28] and offers RESPORGs access to the SMS/800 data base. LECs that own SCPs also interconnect with the SMS, which periodically updates the information in the LECs' SCPs. That latter service is provided on a contractual basis and is not offered in the tariff.

40. We invite interested parties to comment on the reasonableness of certain terms and conditions in the BOCs' SMS/800 tariff. In particular, petitioners have complained that the tariff does not define the procedures to be followed when a change from one RESPORG to another is not made within two days and the sanctions to be imposed when the tariff provisions are violated. Further, petitioners contend that the procedures for requesting and confirming change requests are inadequate or vague. Petitioners also claim that the liability provisions relating to patent infringement are unjust and unreasonable in light of the fact that the BOCs selected the technology. Petitioners argue that the requirement that a RESPORG purchase liability insurance is unprecedented and discriminatory. Additionally, petitioners claim that the tariff should set a more specific time within which RESPORGs must make customer-requested traffic changes, *e.g.,* moving traffic to a new IXC. Petitioners also question the appropriateness of incorporating other documents, such as industry guidelines, by reference. In particular, petitioners question whether RESPORG eligibility requirements should be in the tariff, rather than in industry guidelines that are incorporated into the tariff by reference. Petitioners criticize the lack of procedures to ensure evenhanded enforcement of the terms and conditions of the SMS/800 tariff and the lack of explanation about what enforcement measures will be taken against RESPORGs that fail to comply with tariff requirements. Petitioners challenge the reasonableness of the provision that the number administration service center (NASC)[29] will perform changes from one RESPORG to another on a negotiated interval basis rather than within a fixed time limit. Finally, petitioners challenge the reasonableness of requiring that, when requesting the NASC to make a RESPORG change, the receiving RESPORG must mail a written request to NASC and that the NASC will return confirmation notices by mail. The BOCs should address in their direct case, the reasonableness of these aspects of their tariff.

Issue 8. The reasonableness of the BOCs' cost allocations and demand estimates for their SMS/800 tariff.

41. The BOCs, for SMS/800 services provided to RESPORGs must to establish rates for the services provided to the RESPORGs that reasonably reflect their cost of service. We will investigate whether the BOCs' reasonable costs of providing service justify the rates in the SMS/800 tariff.

42. In their petitions against the SMS/800 transmittal, petitioners questioned whether the BOCs had properly allocated SMS/800 costs between the tariffed RESPORG services and other services, such as the untariffed SCP updating service provided to SCP owners, as described in paragraph 37. Also, petitioners have questioned whether the BOCs provide proper cost support and properly account for SMS/800 costs incurred in transactions with affiliated entities. Petitioners further questioned the assumptions, such as demand forecasts, labor wage rates, depreciation and tax expenses, that the BOCs used in developing their rates for these services. Petitioners have also argued that the rates are excessive because the tariff understates demand. To assist in our resolution of these cost support issues, we require the BOCs, as owners of the SMS/800, to provide the information requested in Appendix C as part of their direct cases. Parties commenting on the BOCs' direct case may address these issues and the responses to the information requests in Appendix C.

43. On April 28, 1993, the Bureau issued the *800 Data Base Access Tariff Order* which, among other things, suspended the Bell Operating Companies' Tariff F.C.C. No. 1, Transmittal No. 1, for one day, imposed an accounting order, and initiated an investigation of that transmittal. Transmittal Nos. 2 and 3[30] raise the same issues as Transmittal No. 1, which is subject to the investigation initiated in the *800 Data Base Access Tariff Order*. Therefore, Transmittal Nos. 2 and 3 will also be subject to this investigation.

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[27] For example, Cincinnati Bell uses CCSCIS to develop STP port termination costs.

[28] *See* n.4, *supra*.

[29] The "NASC" is the organization that administers the SMS/800 system for the centralized management of 800 numbers for 800 data base service.

[30] Sprint and MCI each filed a petition against Transmittal 3 on April 30, 1993.

III. PROCEDURAL MATTERS

A. Filing Schedules

44. This investigation, to be identified as CC Docket No. 93-129, will be conducted as a notice and comment proceeding during which the carriers bear the burden of proof to show that their new or revised rates are just and reasonable.[31] The LECs identified in Appendices A, B and C of the *800 Data Base Access Tariff Order* are designated as parties. These parties shall file their direct cases and responses to information requests no later than August 19, 1993. The direct cases must present the parties' positions with respect to the issues described in this Order. Pleadings responding to the direct cases may be filed no later than September 20, 1993, and must be captioned "Opposition to Direct Case" or "Comments on Direct Case." The parties may each file a "Rebuttal" to oppositions or comments no later than September 30, 1993.

45. An original and four copies of all pleadings must be filed with the Secretary of the Commission. In addition, one copy must be delivered to the Commission's commercial copying firm, International Transcription Service, Room 246, 1919 M Street, N.W., Washington, D.C. 20554. Also, one copy of each pleading must be delivered to the Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554. Members of the general public who wish to express their views in an informal manner regarding the issues in this investigation may do so by submitting one copy of their comments to the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554. Such comments must specify the docket number of this investigation.

46. All relevant and timely pleadings will be considered by the Commission. In reaching a decision, the Commission may take into account information and ideas not contained in pleadings, provided that such information or a writing containing the nature and source of such information is placed in the public file, and provided that the fact of reliance on such information is noted in the Order.

B. Ex Parte Requirements

47. *Ex parte* contacts (*i.e.*, written or oral communications which address the procedural or substantive merits of the proceeding which are directed to any member, officer, or employee of the Commission who may reasonably be expected to be involved in the decisional process in this proceeding) are permitted in this proceeding during the time periods established by the Commission's rules. Written *ex parte* contacts must be filed on the day submitted with the Secretary and Commission employees receiving each presentation. For other requirements, *see generally* Section 1.1200 *et seq.* of the Commission's Rules, 47 C.F.R. § 1.1200 *et seq.*

C. Paperwork Reduction Act

48. The investigation established in this Order has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection, or recordkeeping, labeling, disclosure or other record retention requirements as contemplated under the statute. *See* 44 U.S.C. § 3502(4)(A).

IV. ORDERING CLAUSES

49. IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201-205 and 403 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 201-205 and 403, that the issues set forth in this Order ARE DESIGNATED FOR INVESTIGATION.

50. IT IS FURTHER ORDERED that the local exchange carriers listed in Appendices A, B and C of the *800 Data Base Access Tariff Order* SHALL BE parties to this proceeding.

51. IT IS FURTHER ORDERED that each local exchange carrier that is a party to this proceeding SHALL INCLUDE, in its direct case, a response to each request for information that it is required to answer in Appendices A,B or C, that are incorporated in this order.

52. IT IS FURTHER ORDERED that, pursuant to Section 205 of the Communications Act, 47 U.S.C. § 205, the Bell Operating Companies Tariff F.C.C. No. 1, Transmittals 2 and 3, ARE SUBJECT to the investigation in this docket.

53. IT IS FURTHER ORDERED that the petitions for rejection and suspension and/or investigation of the SMS/800 Tariff, Transmittal 3, filed by MCI Telecommunications Corporation and Sprint Corporation, ARE GRANTED to the extent indicated, and otherwise ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief
Common Carrier Bureau

APPENDIX A

Information Request for Exogenous Costs
CC Docket No. 93-129

In order to assist the Bureau staff in the investigation of 800 data base rates, the price cap carriers identified in this appendix are directed to provide the following information regarding exogenous costs for rates that became effective on May 1, 1993, including any subsequent rate revisions. The data should be submitted in your direct case and on 5.25 inch PC floppy disks, double sided double density. One copy of the floppy disk filing shall be provided directly to Tom Quaile in Room 518, 1919 M Street, NW. A copy of the required information, in LOTUS 1-2-3 spreadsheet format, can be obtained from the Tariff Division for use in meeting this filing requirement.

I. Unit Cost and Investment Information

[31] *See*, Section 204(a) of the Communications Act, 47 U.S.C. § 204(a).

For each function,[32] provide unit gross investment in each of the respective Part 32 accounts. On the same basis, provide the following unit costs: (1) Depreciation, (2) Net Return, (3) Federal Income Tax, (4) State and Local Income Tax, (5) Maintenance, (6) Administration, (7) Other Tax, (8) Other Direct Expense, (9) Total Overhead Loadings, and (10) Total Expense.

The Part 32 accounts listed on the spreadsheet should include all applicable plant accounts. If plant is included in accounts other than those listed on the spreadsheet, please show the Part 32 account and the amount in a note. For accounts that do not apply to your company, enter NONE. Unit costs should be entered by Part 32 account if the cost is plant-based. At a minimum, the plant-based unit costs should include Depreciation, Net Return, Federal Income Tax, and State and Local Income Tax. For costs that are not plant-based, enter the amount in the total column, and enter the applicable Part 32 expense account. In a separate note, identify which Part 36 category or categories of expense are reflected in each of the Maintenance, Administration, Other Direct Expense, and Overhead Loadings rows on the form.

II. Jurisdictional Separations

For each function, and for each Part 32 plant account identified in the spreadsheet, provide gross investment subject to separations, and the amounts apportioned or assigned to state 800 data base, state other, interstate 800 data base and interstate other. The investment provided in each case should be for only those pieces of equipment used to provide 800 data base service, *i.e.*, for the portion of the Part 32 account that reflects equipment or land or buildings used to provide 800 data base. For example, for General Purpose Computers, provide only investment amounts for the equipment used to provide 800 data base, not the total investment in General Purpose Computers used throughout the company. Also state the method used to assign that investment to interstate 800 data base (*e.g.*, direct assignment, engineering studies).

III. Demand

For 800 data base service, provide the base period demand used in your restructure calculations. Also provide the demand level used in your cost estimates, the time period used in your demand estimates and the discount rate used to calculate a demand estimate that is levelized over a period of several years.

IV. Other

1. If a discount rate is used in your demand calculations, explain the rationale for using this rate.

2. If you based your demand growth assumptions completely on past performance, explain why the introduction of 800 data base service will have no effect on the growth rate for 800 query demand for your company.

3. Explain how the demand assumptions were used in your ratemaking methodology.

4. Provide the annual costs for all expenses related to the SMS/800 incurred pursuant to contracts with Bellcore, Data Services Management, Inc., or any other entity. Provide the terms of the contract and an explanation of how the annualized amount is calculated.

5. Provide the cost detail, by account, associated with upgrading the SSPs for 800 data base service and justify why those upgrades should be treated as exogenous costs.

6. If overhead costs were included as exogenous costs in your initial filing, justify why those costs should be treated as exogenous costs.

7. If signalling link costs between local STPs and regional STPS are included as exogenous costs, justify why those costs should be treated as exogenous costs.

8. If costs for regional or local STPs are included as exogenous costs, justify why those costs should be treated as exogenous costs.

9. For each of your company's SCPs, list and describe each service that is supported by that SCP. (*i.e.*, 800 data base, LIDB, virtual private networks, wide area Centrex or unrelated administrative functions). Provide a diagram of the equipment in an SCP installation typical for your company.

10. If costs for the SCP are allocated among the functions described above, explain your allocation procedures and provide your allocation factors and how these factors were derived.

11. The following carriers are directed to complete the attached spreadsheet and respond to the questions in this appendix.

Ameritech Operating Companies
Bell Atlantic
BellSouth
Centel Telephone Companies
GTE System Telephone Companies(GSTC)
GTE Telephone Operating Companies(GTOC)
Lincoln Telephone Company
NYNEX
Pacific Bell
Rochester Telephone Company
SNET
Southwestern Bell
United Telephone Company
U.S. West

[32] The functions include the signalling transfer point/signalling control point (STP/SCP) signalling link, local STP/regional STP signalling links, the SCP/SMS (Service management system) signalling link, SCPs, tandem switches and signal switching points (SSPs).

INFORMATION REQUEST FOR 800 DATABASE SERVICE EXOGENOUS COSTS

1. Unit Cost and Investment	A Land Acct 2111	B Buildings Acct 2121	C General Purpose Computers Acct 2124	D Analog Switching Acct 2211	E Digital Switching Acct 2212	F Radio System Acct 2231	G Circuit Equipment Acct 2232	H Other Terminal Equipment Acct 2362	I Poles Acct 2411	J Aerial Cable Acct 2421	K Underground Cable Acct 2422	L Buried Cable Acct 2423	M Intrabldg Network Cable Acct 2426	N Aerial Wire Acct 2431	O Conduit System Acct 2441	P Total
STP/SCP Signalling Link																
Unit Investment																
Unit Costs																
Depreciation																
Net Return																
Federal Income Tax																
State & Local Income Tax																
Maintenance																
Administration																
Other Tax																
Other Direct Expense																
Overhead Loadings																
Total																
Local STP/Regional STP Signalling Link																
Unit Investment																
Unit Costs																
Depreciation																
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Unit Investment																
Unit Costs																
Depreciation																
Net Return																
Federal Income Tax																
State & Local Income Tax																
Maintenance																
Administration																
Other Tax																
Other Direct Expense																
Overhead Loadings																
Total																
SCP																
Unit Investment																
Unit Costs																
Depreciation																
Net Return																
Federal Income Tax																
State & Local Income Tax																
Maintenance																
Administration																
Other Tax																
Other Direct Expense																
Overhead Loadings																
Total																
Tandem Switch																
Unit Investment																
Unit Costs																
Depreciation																
Net Return																
Federal Income Tax																
State & Local Income Tax																
Maintenance																
Administration																
Other Tax																
Other Direct Expense																
Overhead Loadings																
Total																

	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P
	Land Acct 2111	Buildings Acct 2121	General Purpose Computers Acct 2124	Analog Switching Acct 2211	Digital Switching Acct 2212	Radio System Acct 2231	Circuit Equipment Acct 2232	Other Terminal Equipment Acct 2362	Poles Acct 2411	Aerial Cable Acct 2421	Underground Cable Acct 2422	Buried Cable Acct 2423	Intrabldg Network Cable Acct 2425	Aerial Wire Acct 2431	Conduit Systems Acct 2441	Total
SSP																
Unit Investment																
Unit Costs																
Depreciation																
Net Return																
Federal Income Tax																
State & Local Income Tax																
Maintenance																
Administration																
Other Tax																
Other Direct Expense																
Overhead Loadings																
Total																
II. Jurisdictional Separations																
STP/SCP Signalling Link																
Total Investment																
Total Company																
Subject to Separation																
State 800 Database																
State Other																
Interstate 800 Database																
Interstate Other																
Method of Assignment																
Local STP/Regional STP Signalling Link																
Total Investment																
Total Company																
Subject to Separation																
State 800 Database																
State Other																
Interstate 800 Database																
Interstate Other																
Method of Assignment																
SCP/SMS Signalling Link																
Total Investment																
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SCP																
Total Investment																
Total Company																
Subject to Separation																
State 800 Database																
State Other																
Interstate 800 Database																
Interstate Other																
Method of Assignment																

	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P
	Land Acct 2111	Buildings Acct 2121	General Purpose Computers Acct 2124	Analog Switching Acct 2211	Digital Switching Acct 2212	Radio System Acct 2231	Circuit Equipment Acct 2232	Other Terminal Equipment Acct 2362	Poles Acct 2411	Aerial Cable Acct 2421	Underground Cable Acct 2422	Buried Cable Acct 2423	Intrabldg Network Cable Acct 2429	Aerial Wire Acct 2431	Conduit Systems Acct 2441	Total
Tandem Switch																
Total Investment																
Total Company																
Subject to Separation																
State 800 Database																
State Other																
Interstate 800 Database																
Interstate Other																
Method of Assignment																
SSP																
Total Investment																
Total Company																
Subject to Separation																
State 800 Database																
State Other																
Interstate 800 Database																
Interstate Other																
Method of Assignment																

	A
IL Demand	Total
800 Database Queries	
State 800 Database	
State Other	
Interstate 800 Database	
Interstate Other	
Base Period Demand	
Estimated Demand	
Time Period	
Discount Rate	

APPENDIX B

Information Request for 800 Data base Service Costs
CC Docket No. 93-129

In order to assist the Bureau staff in the investigation of 800 data base rates, the rate of return carriers identified in this appendix must complete the attached spreadsheet and respond to questions 1 through 11 for the rates that became effective on May 1, 1993 and any subsequent rate revisions. Carriers specifically identified in this appendix and any carriers that reduced demand assumptions to compensate for unbillable queries are directed to respond only to the demand section of the spreadsheet for the rates that became effective on May 1, 1993 and any subsequent rate revisions. Submit the data in your direct case and on 5.25 inch PC floppy disks, double sided double density. One copy of the floppy disk filing shall be provided directly to Tom Quaile in Room 518, 1919 M Street, NW. A copy of the required information, in LOTUS 1-2-3 spreadsheet format, can be obtained from the Tariff Division for use in meeting this filing requirement.

I. Unit Cost and Investment Information

Complete the parts of the spreadsheet that apply to the functions you include as costs for 800 data base service.

For each function,[33] provide unit gross investment in each of the respective Part 32 accounts. On the same basis, provide the following unit costs: (1) Depreciation, (2) Net Return, (3) Federal Income Tax, (4) State and Local Income Tax, (5) Maintenance, (6) Administration, (7) Other Tax, (8) Other Direct Expense, (9) Total Overhead Loadings, and (10) Total Expense.

The Part 32 accounts listed on the spreadsheet should include all applicable plant accounts. If plant is included in accounts other than those listed on the spreadsheet, please show the Part 32 account and the amount in a note. For accounts that do not apply to your company, enter NONE. Unit costs should be entered by Part 32 account if the cost is plant-based. At a minimum, the plant-based unit costs should include Depreciation, Net Return, Federal Income Tax, and State and Local Income Tax. For costs that are not plant-based, enter the amount in the total column, and enter the applicable Part 32 expense account. In a separate note, identify which Part 36 category or categories of expense are reflected in each of the Maintenance, Administration, Other Direct Expense, and Overhead Loadings rows on the form.

II. Jurisdictional Separations

For each function, and for each Part 32 plant account identified in the spreadsheet, provide gross investment subject to separa tions, and the amounts apportioned or assigned to state 800 data base, state other, interstate 800 data base and interstate other. The investment provided in each case should be for only those pieces of equipment used to provide 800 data base service, *i.e.*, for the portion of the Part 32 account that reflects equipment or land or buildings used to provide 800 data base. For example, for General Purpose Computers, provide only investment amounts for the equipment used to provide 800 data base, not the total investment in General Purpose Computers used throughout the company. Also explain and justify the method used to assign that investment to interstate 800 data base (*e.g.*, direct assignment, engineering studies).

III. Demand

1. For 800 data base service, provide the demand level used in your cost calculations.

2. If in calculating your costs, you lowered your demand estimate to compensate for unbillable queries, thereby increasing costs, provide the percent by which you lowered demand.

IV. Other

3. Explain and justify your rationale for the factor used to decrease demand for your ratemaking calculations.

4. Provide the name of the SCP provider for your query service.

5. Provide the per query rate on which your rates were based.

6. Did your SCP provider(s) revise rates since your original rate calculations?

7. If your SCP provider(s) revised rates, have you revised your rates to reflect the change in your costs?

8. If you use two or more SCP providers and develop a composite query cost, explain how the composite is calculated for inclusion in your rates.

9. If you use a transport provider, provide the name and per query rate assessed by that provider.

10. Provide worksheets showing all relevant data and calculations.

11. Include and justify any other costs incurred to provide 800 service.

The following carriers, and any carrier that revised 800 data base rates since the original filing, are directed to complete the attached spreadsheet and respond to questions 1 through 11.

Centel Telephone Cos.
Cincinnati Bell Telephone Co.
Great Plains Communications, Inc.

Lafourche Telephone Co.
Taconic Telephone Corp.
Roseville Telephone Co.

[33] The functions include the signalling transfer point/signalling control point (STP/SCP) signalling link, local STP/regional STP signalling links, the tandem switches and signal switching points (SSPs).

The following carriers, and all carriers that included an adjustment to their demand assumptions for unbillable queries, are directed to respond only to the demand section of the attached spreadsheet.

Illinois Consolidated Telephone Co.

Rochester Telephone Corp. (Enterprise Telephone Co.)

Chillacothe Telephone Co.

ALLTEL Telephone System

Lufkin-Conroe Telephone Exchange, Inc.

National Exchange Carrier's Association

Telephone Utilities Exchange Carrier Association

Union Telephone Company

INFORMATION REQUEST FOR 800 DATABASE SERVICE COSTS

1. Unit Cost and Investment	A Land Acct 2111	B Buildings Acct 2121	C General Purpose Computers Acct 2124	D Analog Switching Acct 2211	E Digital Switching Acct 2212	F Radio System Acct 2231	G Circuit Equipment Acct 2232	H Other Terminal Equipment Acct 2362	I Poles Acct 2411	J Aerial Cable Acct 2421	K Underground Cable Acct 2422	L Buried Cable Acct 2423	M Intrabldg Network Cable Acct 2426	N Aerial Wire Acct 2431	O Conduit Systems Acct 2441	P Total
STP/SCP Signaling Link																
Unit Investment																
Unit Costs																
Depreciation																
Net Return																
Federal Income Tax																
State & Local Income Tax																
Maintenance																
Administration																
Other Tax																
Other Direct Expense																
Overhead Loadings																
Total																
Local STP/Regional STP Signaling Link																
Unit Investment																
Unit Costs																
Depreciation																
Net Return																
Federal Income Tax																
State & Local Income Tax																
Maintenance																
Administration																
Other Tax																
Other Direct Expense																
Overhead Loadings																
Total																
Tandem Switch																
Unit Investment																
Unit Costs																
Depreciation																
Net Return																
Federal Income Tax																
State & Local Income Tax																
Maintenance																
Administration																
Other Tax																
Other Direct Expense																
Overhead Loadings																
Total																
SCP																
Unit Investment																
Unit Costs																
Depreciation																
Net Return																
Federal Income Tax																
State & Local Income Tax																
Maintenance																
Administration																
Other Tax																
Other Direct Expense																
Overhead Loadings																
Total																

	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P
	Land Acct 2111	Buildings Acct 2121	General Purpose Computers Acct 2124	Analog Switching Acct 2211	Digital Switching Acct 2212	Radio System Acct 2231	Circuit Equipment Acct 2232	Other Terminal Equipment Acct 2362	Poles Acct 2411	Aerial Cable Acct 2421	Underground Cable Acct 2422	Buried Cable Acct 2423	Intrabldg Network Cable Acct 2426	Aerial Wire Acct 2431	Conduit Systems Acct 2441	Total
A. Jurisdictional Separation.																
STP/SCP Signalling Link																
Total Investment																
Total Company																
Subject to Separation																
Bells 800 Database																
Bells Other																
Interbills 800 Database																
Interbills Other																
Method of Assignment																
Local STP/Regional STP Signalling Link																
Total Investment																
Total Company																
Subject to Separation																
Bells 800 Database																
Bells Other																
Interbills 800 Database																
Interbills Other																
Method of Assignment																
Tandem Switch																
Total Investment																
Total Company																
Subject to Separation																
Bells 800 Database																
Bells Other																
Interbills 800 Database																
Interbills Other																
Method of Assignment																
SSP																
Total Investment																
Total Company																
Subject to Separation																
Bells 800 Database																
Bells Other																
Interbills 800 Database																
Interbills Other																
Method of Assignment																

B. Demand	A Total
800 Database Queries	
Bells 800 Database	
Bells Other	
Interbills 800 Database	
Interbills Other	
Unbillable Query Factor	

APPENDIX C

Information Request for 800 Service Management System Service Costs

CC Docket No. 93-129

In order to assist the Bureau staff in the investigation of 800 data base and 800 Service Management System (SMS/800) rates, the Bell Operating Companies and Southwestern Bell are directed to respond to the following questions concerning the rates that became effective on May 1, 1993 and any subsequent rate revisions. Submit the data in your direct case and on 5.25 inch PC floppy disks, double sided double density. One copy of the floppy disk filing shall be provided directly to Tom Quaile in Room 518, 1919 M Street, NW.

Southwestern Bell

Costs

1. For the Kansas City Data Center and for all other Southwestern Bell data centers, provide, by category, *e.g.*, administration, product development, and by Part 32 account, the total annual costs incurred for the year ending December 31, 1992.

2. For the Kansas City Data Center and all other Southwestern Bell data centers, provide, by category and by Part 32 account, a projection of the total annual costs for each year used in your representative period.

Regulated/Unregulated Costs

3. For the Kansas City Data Center and the St. Louis Data Center provide, by category and by Part 32 account, the regulated and unregulated costs incurred for the year ending December 31, 1992.

4. For the Kansas City Data Center and the St. Louis Data Center provide, by category and by Part 32 account, a projection of the regulated and unregulated costs for each year used in your representative period.

Costs of Services

5. List and describe each regulated and unregulated service, including SMS/800 service, supported by the Kansas City Data Center and by the St. Louis Data Center prior to the introduction of 800 number portability on May 1, 1993.

6. Explain and demonstrate how total costs for the Kansas City Data Center and the St. Louis Data Center were apportioned among the services listed above.

7. If allocation factors were used to apportion costs, give the basis and rationale for each of these factors.

8. List and describe each service supported by the Kansas City Data Center and by the St. Louis Data Center after the introduction of 800 number portability on May 1, 1993.

9. For each service listed in the answer to question 8, demonstrate how total data center costs were apportioned.

10. If allocation factors were used to apportion costs, give the basis for and justify the use of each factor.

Revenues

11. Explain the nature of the contract between Southwestern Bell and the other Bell Operating Companies under which Southwestern Bell maintains the SMS/800 data base and for billing. Provide the anticipated charges to be assessed by Southwestern for the SMS to the Bell Operating companies for the period May 1, 1993 through April 30, 1994.

The Bell Operating Companies

12. Provide, by category, and by Part 32 account, a projection of the total annual costs for the SMS/800 system, for each year used in your representative period. Explain how these costs are apportioned between regulated and unregulated services.

13. Explain the nature of the contracts with the SCP owners for updating the SCPs and provide the specific charges, by SCP owner, that will be assessed to the SCP owners for updating the SCPs for the period May 1, 1993 through April 30, 1994.

14. Explain the nature of the contracts with Bellcore, Data Service Management Inc. Lockheed Information Management Services Co. and provide the specific charges, by entity, that each of these entities will charge to the Bell Operating Companies for the period May 1, 1993 through April 30, 1994.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Micronesian Telecommunications Corporation Revisions to Tariff F.C.C. No. 1 — Transmittal No. 88

ORDER

Adopted: July 21, 1993; Released: July 22, 1993

By the Chief, Tariff Division, Common Carrier Bureau:

1. On June 8, 1993, Micronesian Telecommunications Corporation (MTC) filed the captioned tariff revisions which are scheduled to become effective July 23, 1993. Transmittal 88 introduces International Direct Distance Dialed (IDDD) and Prepaid Card Phone rates for calls to and from the Marshall Islands, and reduces the additional minute rate for person-to-person and station-to-station calls. It also reduces initial first minute, person-to-person and IDDD rates to Alaska, as well as additional minute rates on all calls to Alaska.

2. On June 10, 1993, IT&E Overseas, Inc. (IT&E) filed a petition to reject Transmittal 88. IT&E contends MTC set the tariff's effective date 45 days from the issue date to establish apparent compliance with filing requirements for dominant carrier tariffs, but still failed to file cost support data. IT&E asserts the rate reductions are unsupported and should be rejected as unlawful. IT&E iterates its view that MTC is a dominant carrier under the Commission's competitive carrier decisions, incorporating by reference its argument in an IT&E petition to reject an earlier MTC Transmittal.[1]

3. IT&E also addresses MTC's Reply to that previous petition. IT&E states that the FCC Manual for Filing Section 43.61 Data explicitly characterizes Micronesia as a U.S. point, rather than a foreign point, for traffic reporting purposes. IT&E states there is nothing in that manual to support the view that Micronesia, or the points affected by Transmittal 88, are treated as "international" in nature by the Commission. That some service points may be jurisdictionally international, IT&E asserts, is not a basis for treating MTC as though its service is purely international. IT&E Petition at 2-3.

4. MTC did not submit a reply. MTC did, however, file an Application for Special Permission to advance the effective date, and included a demonstration of incremental net revenue expected as a result of the rate reductions.

5. The Tariff Division has reviewed Micronesia Telecommunications Corporation Transmittal No. 88, IT&E's petition, MTC's reply, and MTC's net revenue exhibit. We conclude that the transmittal is not so patently unlawful as to require rejection, and that no investigation is warranted at this time.

6. Accordingly, IT IS ORDERED that the petition to reject Micronesian Telecommunications Corporation Transmittal No. 88, filed by IT&E Overseas, Inc., IS DENIED.

7. IT IS FURTHER ORDERED that MTC Application for Special Permission No. 32, filed June 24, 1993, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] IT&E Petition at 1-2. The earlier transmittal, MTC Transmittal No. 85, became effective June 21, 1993. Micronesian Telecommunications Corporation Trans. No. 85, DA 93-689 (released June 14, 1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-64

In the Matter of

Amendment of Section 73.202(b), RM-8195
Table of Allotments,
FM Broadcast Stations.
(Corning, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 14, 1993; Released: August 2, 1993

By the Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 8 FCC Rcd 2166 (1993), issued in response to a petition filed on behalf of Phoenix Broadcasting, Inc. ("petitioner"), licensee of Station KCEZ(FM), Channel 264B, Corning, California, proposing the substitution of Channel 264C1 for Channel 264B and modification of its license accordingly.[1] Petitioner filed supporting comments in response to the *Notice*. Fatima Response, Inc., ("FRI") permittee of Station KRKD-FM, Channel 261C3, Dunsmuir, California, and Contour Communications ("Contour") each filed comments and counterproposals.[2]

2. We believe the public interest would be served by substituting Channel 264C1 for Channel 264B at Corning since it could provide an expanded coverage FM service to the community. Channel 264C1 can be allotted to Corning at the petitioner's specified site,[3] consistent with the minimum distance separation requirements of the Commission's Rules. However, the issuance of a license for Channel 264C1 at Corning may be withheld until Station KWHO(FM), Channel 265A, Weed, California, is licensed on Channel 272C1 at the site specified in its construction permit.[4] As requested, we are modifying the petitioner's license herein to specify operation on Channel 264C1, in accordance with the provisions of Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 13, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to Corning, California, as follows:

City	Channel No.
Corning, California	264C1

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license issued to Phoenix Broadcasting, Inc. for

[1] As stated in the *Notice*, petitioner's present transmitter site, located in Zone I-A at coordinates 39-53-17 and 122-37-38, is licensed as a Class B facility, the highest class allowed in that Zone. The proposal under consideration herein would relocate the transmitter for Station KCEZ(FM) to Zone II, where the maximum FM facilities authorized are for Class C stations. *See* Sections 73.202(a), 73.205 and 73.210 of the Commission's Rules.

[2] Both counterproposals are unacceptable pursuant to the Commission's Rules. FRI requests the substitution of Channel 261C1 for Channel 261C3 at Dunsmuir, and modification of its permit for Station KRKD-FM accordingly. Contour requests the allotment of Channel 265A to Weaverville, as its first local aural transmission service.

Although FRI and Contour each signed their counterproposals and provided their addresses, both failed to include an affidavit verifying that the statements contained in their comments are accurate to the best of their knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel shall be signed and verified by the party and his/her address stated. In the absence of such verification, a pleading may be returned as unacceptable. *See Monroeville, Alabama*, 5 FCC Rcd 7027 (1990). Section 1.402(b) of the Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification.

Moreover, even if the FRI and Contour proposals had not been procedurally defective they are technically deficient, and therefore cannot be considered. Although each counterproposal complies with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules, the requested sites are unacceptable. Specifically, a staff terrain profile analysis reveals that, due to the intervening terrain at Dunsmuir and at Weaverville, the sites chosen by FRI and Contour would require the construction of extremely tall towers in those mountainous areas in order to provide the requisite 70 dBu coverage to their specified communities, as required by Section 73.315 of the Commission's Rules. From that analysis we determined that at the Dunsmuir site at coordinates 40-54-29 and 122-26-38, a tower of 800 meters (2,624 feet) AGL would be required. The Weaverville site, at coordinates 40-52-03 and 122-59-26, would require a tower of 700 meters (2,296 feet) AGL due to an intervening major terrain obstruction of approximately 2,175 meters (7,134 feet) AMSL. Neither FRI nor Contour provided any specific showings attesting to their ability to comply with the requirements of Section 73.315 of the Commission's Rules from their selected sites, or that they would be willing to build towers of the magnitude required at those sites to provide city grade coverage to Dunsmuir and Weaverville.

[3] Coordinates used for Channel 264C1 at Corning are 40-15-31 and 122-05-20.

[4] As stated in the *Notice*, Station KWHO(FM) was modified from Channel 265A to Channel 272C1 at Weed, California, in MM Docket No. 88-28. *See* 5 FCC Rcd 4558 (1990), *recon. denied*, 7 FCC Rcd 4641 (1992). Coordinates at the site specified in Station KWHO(FM)'s construction permit are 41-21-12 and 122-15-35 (File No. BPH-901130ID). Therefore, Station KWHO(FM) is no longer entitled to protection for its former Channel 265A at Weed. We will serve a copy of this *Report and Order* on Tristar Broadcasting Corporation, Inc., licensee of Station KWHO(FM).

Station KCEZ(FM), IS MODIFIED to specify operation on Channel 264C1 in lieu of Channel 264B, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Phoenix Broadcasting, Inc., licensee of Station KCEZ(FM), is required to submit a rule making fee in addition to the fee required for the applications to effectuate the upgrade at Corning, California.

6. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Order* by Certified Mail, Return Receipt Requested, to Tristar Broadcasting Corporation, Inc., Radio Station KWHO(FM), P.O. Box 1023, Weed, California 96094.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

FOIA Control No. 93-57

In the Matter of

Barry A. Stevenson

On the Request for Inspection
of Records

MEMORANDUM OPINION AND ORDER

Adopted: June 18, 1993; Released: August 2, 1993

By the Commision:

1. The Commission has before it an Application for Review filed by Mr. Barry A. Stevenson seeking review of a ruling by the Chief, Field Operations Bureau (FOB), which denied, in part, his Freedom of Information Act (FOIA) request. 5 U.S.C. § 552. In his request, Mr. Stevenson sought access to Commission records compiled during the course of a field investigation concerning Mr. Stevenson's unauthorized operation of an unlicensed radio station in violation of section 301 of the Communications Act, 47 U.S.C. § 301. Specifically, Mr. Stevenson requested copies of "all complaint forms, FCC communications, and claimed tape recordings" regarding the FOB's investigation. As discussed below, we affirm the FOB's initial ruling.

2. The FOB had granted Mr. Stevenson's request, in part, by furnishing him with copies of the requested tape recordings, as well as the factual portions of some of the intra-agency memorandums, which pertained to this investigation. FOB withheld, however, the identity of thirteen complainants and their respective complaints, which were replete with identifying data. The records were withheld pursuant to the confidential source provision of Exemption 7(D) of the FOIA. 5 U.S.C. § 552 (b) (7) (D). FOB found that twelve of the complainants had requested confidentiality, and one complainant had furnished information under circumstances where confidentiality could be reasonably inferred. Additionally, FOB withheld certain intra-agency memorandums that contained predecisional opinions and advice, but released segregable factual material pursuant to the deliberative process privilege of Exemption 5 of the FOIA. 5 U.S.C. § 552 (b) (5).

3. On appeal, Mr. Stevenson broadly contends that FOB's veil of confidentiality effectively prevents him from obtaining any useful information concerning the complainants. Mr. Stevenson does not appear to contest the FOB's decision to withhold the agency's intra-agency memorandums.

4. We conclude that FOB properly withheld the subject complaints in order to protect the identities of their confidential sources. The complaints are replete with identifying data, and Exemption 7(D) of the FOIA permits the Commission to withhold such documents in their entirety. *See KTVY v. United States*, 919 F.2d 1465, 1470-71 (10th Cir. 1990); *L & C Marine Transp. Ltd. v. United States*, 740 F.2d 919, 923-25 (11th Cir. 1984); *see also Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 756 n.9 (1989). Disclosure of these confidential sources could seriously undermine the Commission's investigatory efforts and hamper the Commission's access to such information in fulfilling its law enforcement responsibilities. *See Schmerler v. FCC*, 900 F.2d 333, 336 (D.C. Cir. 1986).

5. In view of the reasons set forth above, IT IS ORDERED that the Application for Review filed by Barry A. Stevenson IS DENIED. The Requester may seek judicial review of this decision pursuant to 5 U.S.C. § 552 (a) (4) (B).

6. The officials responsible for this action are the following Commissioners: Chairman James H. Quello, Commissioners Andrew C. Barrett, Ervin S. Duggan.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 2, 1993

THREE LOCAL EXCHANGE CARRIERS FILE PETITIONS FOR WAIVER OF SECTION 32.27 OF THE COMMISSION'S RULES

PUBLIC COMMENT INVITED

Three local exchange carriers (LECs) filed petitions for waiver of Section 32.27 of the Commission's rules. These rules set forth the terms under which LECs may engage in transactions with their affiliated companies. The LECs request waivers of these rules to allow them to engage in affiliate transactions under terms that are not provided for under the rules. Listed below are the names of the LECs that filed petitions, the dates the petitions were filed and the file number assigned to each petition.

BellSouth Telecommunications, Inc.	6/29/93	AAD No. 93-80
United Telephone Companies	6/30/93	AAD No. 93-81
U S West, Inc.	7/2/93	AAD No. 93-82

Parties may file comments on the petitions for waiver no later than **August 27, 1993**. Replies should be filed by **September 13, 1993**. Comments should reference the applicable AAD file number listed above. A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L St., N.W., Room 812, Washington, D.C. 20554 and the International Transcription Service (ITS), 2100 M St., N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L St., N.W., Suite 812, Washington, D.C. Copies are also available from ITS.

For further information contact Alicia Dunnigan at (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

New Jersey Bell Telephone Company — ENF 84-22

Petition for Waiver of Section 64.702 of the Commission's Rules (Computer II)

MEMORANDUM OPINION AND ORDER

Adopted: July 23, 1993; Released: August 2, 1993

By the Commission:

I. INTRODUCTION

1. On January 13, 1986, Tymnet, Inc. (Tymnet) and GTE Telenet Communications Corp. (Telenet) filed applications for review of an Order issued by the Common Carrier Bureau (Bureau) granting New Jersey Bell Telephone Company (NJB) a waiver of the *Computer II* structural separation requirements[1] to jointly market an enhanced service, asynchronous to X.25 protocol conversion, with its basic services.[2] We dismiss the applications for review as moot because of our replacement of the *Computer II* requirements with *Computer III* nonstructural safeguards,[3] and the Bureau's grant of structural separation relief for NJB.[4]

II. BACKGROUND

2. In the *BOC Separation Order*, the Commission applied the *Computer II* rules to the BOCs, requiring them to provide enhanced services through a separate subsidiary. Subsequently, in response to the Commission's indication that it would allow carriers to provide protocol conversion without structural separation under some circumstances,[5] NJB, along with several other BOCs, petitioned for waiver of the structural separation requirements in offering asynchronous to X.25 protocol conversions.[6] The Commission, in the *Asynchronous-X.25 Order*, concluded that grant of waiver to the BOCs to provide asynchronous to X.25 protocol conversions on a nonseparated basis would be in the public interest subject to certain conditions. The *Asynchronous-X.25 Order* also stated that the Commission would consider waivers to permit joint marketing of basic services and protocol conversion, again, subject to certain conditions.

3. Pursuant to the *Asynchronous-X.25 Order*, NJB filed, on June 19, 1985, a petition asking for waiver of *Computer II* to allow it to market asynchronous to X.25 protocol conversion services jointly with its basic packet switched data transmission services. On December 10, 1985, after initially denying NJB's petition,[7] the Bureau granted NJB's requested waiver.[8] Both Tymnet and Telenet filed applications for review of the *December Order*. These are the applications for review now before us.

III. DISCUSSION

4. In their applications for review, Tymnet and Telenet ask the Commission to deny NJB's waiver request to jointly market asynchronous to X.25 protocol conversion with its basic services. Both parties advance arguments that NJB failed to satisfy the waiver requirements set forth in the *Asynchronous-X.25 Order*.[9] In addition, both Tymnet and

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[1] In *Computer II*, the Commission established a regulatory framework that allowed American Telephone & Telegraph Co. (AT&T) to provide enhanced services only through a separate subsidiary on an unregulated basis. *See* Amendment of Section 64.702 of the Commission's Rules and Regulations (*Computer II*), 77 FCC 2d 384 (1980), *mod. on recon.*, 84 FCC 2d 50 (1981), *mod. on further recon.*, 88 FCC 2d 512 (1981), *aff'd sub nom.*, Computer and Communications Indus. Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983). After AT&T's divestiture of the Bell Operating Companies (BOCs), the Commission required the BOCs to adhere to the *Computer II* rules. *See* Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services, and Cellular Communications Services by the Bell Operating Companies, *Report and Order*, 95 FCC 2d 1117 (1984) (*BOC Separation Order*), *aff'd sub nom.*, Illinois Bell Telephone v. FCC, 740 F.2d 465 (7th Cir. 1984), *aff'd on recon.*, FCC 84-252, 49 Fed. Reg. 26056 (1984), *aff'd sub nom.*, North American Telecommunications Ass'n v. FCC, 772 F.2d 1282 (7th Cir. 1985).

[2] New Jersey Bell Telephone Company, Petition for Waiver of Section 64.702 of the Commission's Rules (*Computer II*), Mimeo NO. 1426 (Com. Car. Bur. released December 13, 1985) (*December Order*).

[3] *Computer III* Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, CC Docket 90-623, *Report and Order*, 6 FCC Rcd 7571 (1991) (*Computer III Remand: Safeguards Order*), *pets. for recon. pending, pets. for review pending*, People of the State of California and California Public Utilities Commission v. FCC, Case No. 92-70083 (9th Cir. filed February 14, 1992), MCI Telecommunications Corp. v. FCC and U.S.A., Case No. 92-1075 (D.C. Cir. filed February 19, 1992), People of the State of New York and New York Public Service Commission v. FCC, Case No. 92-4032 (2d Cir. filed February 28, 1992).

[4] Bell Atlantic's Notice and Petition for Removal of the Structural Separation Requirement and Waiver of Certain State Tariffing Requirements, *Memorandum Opinion and Order*, 7 FCC Rcd 3877 (Com. Car. Bur. 1992) (*Structural Separation Relief Order*). NJB is a regulated subsidiary of Bell Atlantic.

[5] *See* Communications Protocols under Section 64.702 of the Commission's Rules and Regulations, *Memorandum Opinion and Order and Statement of Principles*, 95 FCC 2d 584 (1983).

[6] Petitions for Waiver of Section 64.702 of the Commission's Rules (*Computer II*), *Memorandum Opinion and Order*, 100 FCC 2d 1057 (1985) (*Asynchronous-X.25 Order*).

[7] The Bureau denied NJB's petition without prejudice to later grant of waiver upon submission of additional information. New Jersey Bell Telephone Company, Petition for Waiver of Section 64.702 of the Commission's Rules (*Computer II*), Mimeo No. 0426 (Com. Car. Bur. released October 24, 1985).

[8] *December Order*, *supra* n.2.

[9] *See e.g.*, Tymnet Application for Review at 4-6; Telenet Application for Review at 9-18.

Telenet argue that the Bureau failed to follow prior Commission practice by not placing NJB's supplemental filings that led to the *December Order* on public notice.[10]

5. Since release of the *December Order*, we have reversed our determination in *Computer II* and the *BOC Separation Order* to impose structural separation requirements for the provision of enhanced services by the BOCs.[11] Instead we have replaced the separate subsidiary requirements for enhanced services with a regime of Open Network Architecture (ONA) requirements and accounting and other nonstructural safeguards.[12] On June 4, 1992, the Bureau, pursuant to delegated authority, granted Bell Atlantic complete structural separation relief.[13] We find that, because we have replaced the *Computer II* regime with *Computer III* nonstructural separation requirements such as accounting safeguards and ONA requirements, and because NJB is no longer subject to *Computer II* structural separation requirements, NJB's waiver is now unnecessary. Therefore, we conclude that the parties' applications for review should be dismissed as moot.

IV. ORDERING CLAUSE

6. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), that the Applications for Review filed by GTE Telenet Communications Corporation and Tymnet, Incorporated ARE DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[10] Tymnet Application for Review at 7-9; Telenet Application for Review at 5-8. Because we find the issue of waiver moot, we need not address the adequacy of notice given to either Tymnet or Telenet.

[11] *Computer III Remand: Safeguards Order*, 6 FCC Rcd at 7572, para. 1. *See also* Amendment of Sections 64.702 of the Commission's Rules and Regulations, (*Computer III*), Phase I, *Report and Order*, 104 FCC 2d 958 (1986) (*Phase I Order*), *recon.*, 2 FCC Rcd 3035 (1987) (*Phase I Recon. Order*), *further recon.*, 3 FCC Rcd 1135 (1988), *second further recon.*, 4 FCC Rcd 5927 (1989), *Phase I Order* and *Phase I Recon. Order vacated sub nom.*, California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Phase II, 2 FCC Rcd 3072 (1987) (*Phase II Order*), *recon.*, 3 FCC Rcd 1150 (1988), *further recon.*, 4 FCC Rcd 5927 (1989), *Phase II Order vacated sub nom.*, California v. FCC, 905 F.2d 1217 (9th Cir. 1990), *pet. for rev pending*, BellSouth Corp. v. FCC, Case No. 88-7290 (9th Cir. filed April 20, 1988).

[12] *See Computer III Remand: Safeguards Order*, *supra*, n.3; Computer III Remand Proceedings, CC Docket 90-368, *Report and Order*, 5 FCC Rcd 7719 (1990) (*Computer III Remand: ONA Requirement), recon. den.*, 7 FCC Rcd 909 (1992). *See also Phase II Order*, 2 FCC Rcd 3072 (1987), *recon.*, 3 FCC Rcd 1150 (1988), *Phase II Order vacated sub nom.*, California v. FCC, 905 F.2d 1217 (9th Cir. 1990), *pet. for rev. pending* of *Phase II Order* and *Phase II Recon. Order*, BellSouth Corp. v. FCC, Case No. 88-7290 (9th Cir. filed April 20, 1988).

[13] *See Structural Separation Relief Order*, *supra* n.4.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

THE BELL ATLANTIC
TELEPHONE COMPANIES
Complainant,
v. File No. E-93-21

VALLEYNET,
Defendant.

ORDER

Adopted: July 22, 1993; Released: August 2, 1993

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On November 17, 1992, The Bell Atlantic Telephone Companies ("Bell Atlantic") filed the above-captioned formal complaint against ValleyNet Network Partnership ("ValleyNet"). The complaint alleged that ValleyNet had violated Section 203 of the Communications Act of 1934, as amended, 47 U.S.C. § 203, by providing off-tariff interstate common carrier communications services. ValleyNet filed an answer denying the allegations and a motion to dismiss the complaint.

2. Bell Atlantic and ValleyNet have engaged in negotiations aimed at settling the complaint. As a result of their negotiations, on July 21, 1993, Bell Atlantic and ValleyNet filed a joint motion to dismiss the complaint with prejudice. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the parties' joint motion to dismiss the complaint IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints
and Investigations Branch
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Wards Cove Packing, Inc.	NAL Acct.
Licensee of WA09505	No. 315HF0021
on the Vessel Destination	
Seattle, Washington	

NOTICE OF APPARENT LIABILITY

Adopted: July 16, 1993; **Released: July 19, 1993**

By the Field Operations Bureau:

I. INTRODUCTION

1. This Notice of Apparent Liability for Monetary Forfeiture (NAL) is issued pursuant to Section 364 of the Communications Act of 1934, as amended (the Act), 47 U.S.C. § 362, to Wards Cove Packing, Inc., (Wards Cove) licensee of station WA09505, on the commercial fishing vessel DESTINATION for violation of Sections 362 the Communications Act, 47 U.S.C. § 360, for sailing on the open sea without an annual inspection.

2. The appropriate amount of forfeiture for this violation is $20,000.

II. BACKGROUND

3. On February 18, 1992, the FCC's Alaska office sent a certified letter advising Wards Cove of the Commission's ship inspection schedules for Dutch Harbor, Alaska. Advising Wards Cove that the DESTINATION needed its yearly inspection.

4. On March 12, 1992, the Alaska Office received a facsimile of a Form 801 -- the form used to apply for ship inspections -- from the licensee, requesting an inspection on July 28, 1992, at Dutch Harbor, Alaska. The Alaska Office acknowledged receipt of the request by certified mail, and also advised the licensee to contact the Commission's Aviation and Marine Branch.

5. On July 17, 1992, an FCC agent contacted Wards Cove Packing to confirm the inspection date and time. The inspection date was then rescheduled for July 29th, 1992.

6. The inspection of the vessel on July 29, 1992, revealed that the vessel had been sailing without the required inspection. The pilot log book listed various departure and arrival dates evidencing several days of sailing.[1] The log book also indicates that the vessels departures were to engage in its fishing business.

III. DISCUSSION

7. Section 362 of the Act, and Section 80.802 of the Commission's regulations, 47 U.S.C. § 360, and 47 C.F.R. § 80.802, require that every ship of the United States subject to Part II of Title III of the Communications Act must be inspected at least once each year. The DESTINATION is a U.S. cargo ship registered in Washington, is required to be inspected at least once each year under Section 362 of the Act. The last inspection date for this vessel was on June 5, 1992.

8. The record indicates that the licensee, Wards Cove Packing, made no effort to obtain an inspection prior to the required inspection date. Instead, the vessel continued to engage in its regular enterprise, commercial fishing, without an inspection.

9. Section 364 of the Act, 47 U.S.C. § 364, authorizes the Commission to impose a $5,000 per day forfeiture on U.S. vessels which are avigated in violation of the Act or Commission Rules.

10. The forfeiture amount has been increased for each actionable date of violation. Consideration has also been given to circumstances warranting downward adjustment according to criteria given in the Commission's *Policy Statement, Standards For Assessing Forfeitures*, 6 FCC Rcd 4695 (1992), *reconsideration denied*, 7 FCC Rcd 5339 (1992), *petition for review pending sub nom. USTA v. FCC*, No.92-1321 (D.C. Cir. filed July 30, 1992) (*Policy Statement*). Accordingly, and with the discretion we expressly reserved in the *Policy Statement*, we are issuing this NAL for $20,000 against Wards Cove Packing, Inc.

IV. CONCLUSION

11. Wards Cove, Inc., licensee of the cargo ship DESTINATION has apparently violated the Act and the Commission's rules. The appropriate amount for this forfeiture is $20,000.

V. ORDERING CLAUSES

12. Accordingly, it is ordered pursuant to Section 364 of the Act, and Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, that Wards Cove Packing., licensee of WA09505, IS APPARENTLY LIABLE FOR A MONETARY FORFEITURE in the amount of twenty thousand dollars ($20,000) for navigating on the open sea without an annual inspection as required by Section 362 of the Act.

13. IT IS FURTHER ORDERED pursuant to Section 1.80(f)(3) of the Commission's Rules, that Wards Cove Packing Inc. shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Any written response must include a detailed factual statement and supporting documentation.[2] Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Payment should be mailed to the following address:

[1] The following information was extracted from the pilot log book:

7/19/92 Depart Dutch Harbor for fishing ground (2300)

7/22/92 Arrive Alyeska dock at Dutch Harbor (1330)

7/25/92 Depart Dutch Harbor for fishing ground (0100)

7/27/92 Arrive Alyeska dock at Dutch Harbor (1200)

[2] Claims of financial inability to pay should be supported by tax returns or other financial statements for the most recent three years.

Federal Communications Commission
P.O. Box 73482
Chicago, Illinois 60673-7482

Written responses regarding why the forfeiture amount should be reduced or not imposed must be marked "Attention NAL Acct. No. 315HF0021" and sent to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division, 1500E3/AJC
1919 M Street, N.W.
Washington, D.C. 20554

14. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for Monetary Forfeiture be sent by certified mail--return receipt requested, to Wards Cove Packing, Inc., at P.O. Box C5030, Seattle, Washington 98105.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Yukon Princess, Inc.	NAL Acct.
Licensee of WAS3635	No. 315HF0022
on the Vessel Yukon Princess	
Seattle, Washington	

NOTICE OF APPARENT LIABILITY

Adopted: July 16, 1993; Released: July 19, 1993

By the Field Operations Bureau:

I. INTRODUCTION

1. This Notice of Apparent Liability for Monetary Forfeiture (NAL) is issued pursuant to Section 364 of the Communications Act of 1934, as amended (the Act), 47 U.S.C. § 362, to Yukon Princess, Inc., licensee of station WAS3635, on the commercial fishing vessel Yukon Princess, for violation of Sections 361 and 362 of the Communications Act, 47 U.S.C. §§ 359, 360, for sailing on the open sea without an annual inspection.

2. The appropriate amount of forfeiture for this violation is $20,000.

II. BACKGROUND

3. On February 18, 1992, the FCC's Anchorage, Alaska, office sent a certified letter to the licensee advising the Company of the Commission's ship inspection schedules for Dutch Harbor, Alaska, which included inspections during the week of April 20th-24th, July 27th-31st, and October 5th-9th of 1992. The Alaska office also advised company representatives that the vessel was required to be inspected on or before May 15, 1992.

4. On May 27, 1992, a Yukon Princess representative called the Alaska office to request an extension on the safety certificate. She was advised regarding the procedures for applying for an inspection, and referred to the Private Radio Bureau's Aviation and Marine Branch.

5. On June 26, 1992 the Alaska office received a request for an inspection at Dutch Harbor on July 27, 1992, from Yukon Princess, Inc. On the same day, the Alaska office confirmed, by certified mail, receipt of the application for inspection, and notified Yukon Princess, Inc. representatives that they would be contacted again prior to the inspection to confirm the inspection date. On July 17, 1992, the inspection date was set for July 28th.

6. The vessel was inspected at Dutch Harbor on July 28, 1992. The vessel passed inspection. An inspection of the vessel's log book indicated that the vessel had, however, sailed on several occasions without the required inspection.[1]

III. DISCUSSION

7. Section 80.802 of the Commission's Rules and Section 362 of the Act require every ship of the United States which is subject to Part II of Title III of the Communications Act to be inspected once every twelve (12) months for compliance with the Act. The Yukon Princess, a U.S. cargo ship of 800 gross tons, registered in Seattle, Washington, is required to be inspected at least once each year. According to available records, the vessel should have been inspected on, or prior to, May 15, 1992, but was not. In spite of that, the vessel continued to sail.

IV. CONCLUSION

8. Pursuant to Section 364 of the Act, 47 U.S.C. § 364, authorizes the Commission to impose a $5,000 forfeiture per day of violation on U.S. vessels which navigate in violation of the Act or Commission Rules. This amount has been increased for each actionable violation date. Consideration has also been given to circumstances warranting downward adjustments according to the criteria suggested in the Commission's *Policy Statement, Standards For Assessing Forfeitures*, 6 FCC Rcd 4695 (1992), *Modified in Part on Recon.*, 7 FCC Rcd 5339 (1992), *petition for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992). (*Policy Statement*). Consistent with the discretion we expressly reserved in the *Policy Statement* we are issuing an NAL for twenty thousand dollars ($20,000) against Yukon Princess, Inc.

V. ORDERING CLAUSES

9. Accordingly, it is ordered pursuant to Section 364 of the Act, and Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, that Yukon Princess, Inc., licensee of WAS3635, IS APPARENTLY LIABLE FOR A MONETARY FORFEITURE in the amount of twenty thousand dollars ($20,000) for navigating on the open sea without the required yearly inspection. 47 U.S.C § 360.

10. IT IS FURTHER ORDERED pursuant to Section 1.80(f)(3) of the Commission's Rules, that Yukon Princess, Inc. shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Any written response must include a detailed factual statement and supporting documentation.[2] Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Payment should be mailed to the following address:

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[1] The vessel's log book indicated the following sailing periods:
7/16/92 Fishing 56-04N X 169-05W (1200) (New ship log)
7/27/92 Fishing 54-17N X 166-19W (0001) Arrive Magone Marine at (0830) in Dutch Harbor

[2] Claims of financial inability to pay should be supported by tax returns or other financial statements for the most recent three years.

Federal Communications Commission
P.O. Box 73482
Chicago, Illinois 60673-7482

Written responses regarding why the forfeiture amount should be reduced or not imposed must be sent to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Mail Stop 1500E3/AJC
1919 M Street, N.W.
Washington, D.C. 20554
ATTN: NAL Acct. No. 315HF0022

11. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability be sent by certified mail--return receipt requested, to Yukon Princess, Inc., 4215 21 St W. Fisheries Bldg., Suite 103, Seattle, WA 98199-0000.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 89-573

PUBLIC NOTICE

Released: July 21, 1993

COMMENTS INVITED ON PHILADELPHIA AREA PUBLIC SAFETY PLAN AMENDMENT

On February 2, 1990, the Commission accepted the Public Safety Plan for the Philadelphia area (Region 28). On June 28, 1993, Region 28 submitted a proposed amendment to its plan that would revise the current channel allotments. Because the proposed amendment is a major change to the Region 28 plan, the Commission is soliciting comments from the public before taking action. (See Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 57.)

Interested parties may file comments to the proposed amendment on or before **August 27, 1993** and reply comments on or before **September 13, 1993**. Commenters should send an original and five copies of comments to the Secretary, Federal Communications Commission, Washington, D.C. 20554 and should clearly identify them as submissions to **Gen. Docket 89-573 Philadelphia-Public Safety Region 28.**

Questions regarding this public notice may be directed to Betty Woolford, Private Radio Bureau, (202) 632-6497 or Ray LaForge, Office of Engineering and Technology, (202) 653-8112.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket NO. 90-119

PUBLIC NOTICE

Released: July 21, 1993

COMMENTS INVITED ON FLORIDA PUBLIC SAFETY PLAN AMENDMENT

On May 10, 1990, the Commission accepted the Public Safety Plan for Florida (Region 9). On June 28, 1993, Region 9 submitted a proposed amendment to its plan that would revise the current channel allotments. Because the proposed amendment is a major change to the Region 9 plan, the Commission is soliciting comments from the public before taking action. (See Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 57.)

Interested parties may file comments to the proposed amendment on or before **August 27, 1993** and reply comments on or before **September 13, 1993**. Commenters should send an original and five copies of comments to the Secretary, Federal Communications Commission, Washington, D.C. 20554 and should clearly identify them as submissions to **Gen. Docket 90-119 Florida-Public Safety Region 9.**

Questions regarding this public notice may be directed to Betty Woolford, Private Radio Bureau, (202) 632-6497 or Ray LaForge, Office of Engineering and Technology, (202) 653-8112.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket NO. 90-498

PUBLIC NOTICE

Released: July 21, 1993

COMMENTS INVITED ON LOUISIANA PUBLIC SAFETY PLAN AMENDMENT

On December 19, 1990, the Commission accepted the Public Safety Plan for Louisiana (Region 18). On July 13, 1993, Region 18 submitted a proposed amendment to its plan that would revise the current channel allotments. Because the proposed amendment is a major change to the Region 18 plan, the Commission is soliciting comments from the public before taking action. (See Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 57.)

Interested parties may file comments to the proposed amendment on or before **August 27, 1993** and reply comments on or before **September 13, 1993**. Commenters should send an original and five copies of comments to the Secretary, Federal Communications Commission, Washington, D.C. 20554 and should clearly identify them as submissions to **Gen. Docket 90-498 Louisiana-Public Safety Region 18.**

Questions regarding this public notice may be directed to Betty Woolford, Private Radio Bureau, (202) 632-6497 or Ray LaForge, Office of Engineering and Technology, (202) 653-8112.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: July 23, 1993

FCC TO HOLD INTERACTIVE VIDEO AND DATA SERVICE (IVDS) LOTTERIES

The Federal Communications Commission will conduct lotteries to resolve mutually exclusive applications for IVDS frequencies in nine service areas on September 15, 1993, at 10:00 AM in Room 856, 1919 M Street, N.W., Washington D.C. The IVDS service areas involved are:

#1 New York, NY/NJ	#7 San Francisco, CA
#2 Los Angeles, CA	#8 Washington, DC
#3 Chicago, IL	#9 Dallas, TX
#4 Philadelphia, PA	#10 Houston, TX
#6 Boston, MA	

Mutually exclusive applications for each service area are identified on the attached pages. The Commission stated in its *Report and Order* in Gen. Docket No. 91-2, 7 FCC Rcd 1630 (1992), that it would use a lottery conducted in accordance with the provisions of 47 C.F.R. § 1.972. A three-digit Identification (ID) Number is associated with each application to be included in the September 15, 1993 lottery. The lottery will be conducted by selecting two three-digit-numbers in each area, with the numbers generated through the use of forced-air ping pong balls. The first entity selected in each service area will receive frequency Segment A and the second Segment B. Once we grant both licenses for an IVDS service area all remaining applications for that service area will be dismissed. There will be no individual notices of dismissal mailed to applicants.

Any applicant that timely filed an application for one of the nine IVDS service areas, but whose name is not shown on the list of applicants for that service area to be included in the September 15, 1993 lottery, must provide persuasive evidence that such an application was timely filed. At a minimum, an example of persuasive evidence would be United States Postal Service "Certified Mail" receipts stapled to a copy of the application. Additionally, pursuant to 47 C.F.R. § 1.41, any interested party may file information with the Commission that may reflect on the suitability of an applicant to be a licensee. Only allegations pertaining to applicants later granted tentative selectee status will be investigated and all allegations directed toward a given tentative selectee will be resolved prior to the issuance of a license to that tentative selectee. Corrections to the listing of applicants to be included in the lottery and information relating to the suitability of these applicants must be received by the Commission within 30 days of the publication of this Public Notice in the *Federal Register* at the following address by 4:30 PM EST: Federal Communications Commission, 1270 Fairfield Road, Gettysburg, PA 17325-7245, ATTENTION: IVDS LOTTERY.

Following the lotteries, the Commission will issue a Public Notice listing the two entities selected (tentative selectees) in each service area. Tentative selectees will have two business days from the date of the Public Notice announcing the winners to file an FCC Form 574 (including required showings) amending their original application with the Commission. Applications must be filed with our Gettysburg, PA licensing facility during this two-day time frame at the following address: Federal Communications Commission, 1270 Fairfield Road, Gettysburg, PA 17325-7245, ATTENTION: IVDS LOTTERY. This application is for an IVDS system license and once granted will allow the licensee to construct an unlimited number of CTS base stations with antenna heights that do not exceed 6.1 meters (20 feet) above ground or an existing manmade structure other than an antenna tower within the service area. The following items on the Form 574 must be completed for an IVDS system license: Item 1, frequency 218.0-218.5 MHz (Segment A) or 218.501-219.0 MHz (Segment B); Item 2, "FXW"; Item 18, the street address and telephone number where a person responsible for system operation may be reached; Item 19, put in service area number; Item 20, "ZV"; Item 21 must be the same name as specified on the Form 155 previously submitted by the applicant; Items 22-25; Item 30; Item 32, "new station"; Item 34; Item 37 and the name and signature blocks.

NOTE: CTSs not meeting the "20 foot" rule must be individually licensed (see paragraph 69 of the *Report and Order*). Such applications, however, do not have to be filed within this two-day period. They should be filed at the following address: Federal Communications Commission, Interactive Video and Data Service, P.O. Box 358365, Pittsburgh, PA, 15251-5365. Applications including a waiver request and requiring a fee must also be sent to the above Pittsburgh address. The following items on the Form 574 must be completed for a CTS that exceeds 6.1 meters (20 feet) above ground or an existing manmade structure other than an antenna tower within the service area. Item 1, frequency 218.0-218.5 MHz (Segment A) or 218.501-219.0 MHz (Segment B); Item 2, "FXV"; Item 8; Item 9; Item 10; Item 11; Item 14; Item 15; Item 16; Item 17; Item 18, the street address and telephone number where a person responsible for system operation may be reached; Item 19, put in service area number; Item 20, "ZV"; Item 21, must be the same name as specified on the Form 155 previously submitted by the applicant; Items 22-25; Item 26; Item 27; Item 28; Item 29; Item 30; Item 32; Item 34; Item 37 and the name and signature blocks.

In addition to the Form 574, tentative selectees must also file the required interference and coverage showings. *See* 47 C.F.R. § 95.815. At a minimum, tentative selectees should provide a narrative as to how they intend to minimize co-channel interference, interference to TV Channel 13 reception if the grade B contour of a TV channel 13 station overlaps the IVDS service area, and interference to the AMTS if the AMTS coverage area overlaps the IVDS service area, and state that they are aware that they must eliminate any interference to TV channel 13 operations or terminate operation of the interfering CTS.

In regard to the coverage showing, the tentative selectees must, at a minimum, provide the following information. They must indicate whether they intend to comply with the 50 percent coverage for population or geographic area. If population is chosen, selectees must state where the population data was obtained. The showing must include a map or maps of the market area showing the Grade B

contour of any TV channel 13 station, general location of each planned CTS (including those that exceed the "20 foot" criteria), the estimated coverage area (39 dBu contour) of each CTS, and how the applicant plans on meeting the 1, 3, and 5 year benchmarks. The showing must include basic information (*i.e.*, power and antenna height assumed and propagation model used) on how the coverage areas were determined. Further, entities planning on using a technology that minimizes interference to TV channel 13 by transmitting during the TV blanking interval rather than the traditional approach of reducing power and antenna height and desiring a higher antenna height than permitted under the rules (but does not require individual licensing) must include a waiver request and the appropriate fee with their application (see paragraph 31 of the *Report and Order*).

The burden is on the tentative selectee to fill out the application correctly and provide sufficient information for the Commission to ascertain readily how the selectee plans to meet the interference and coverage requirements. Applications not filled out correctly, applications not including the required showings, and applications with an insufficient showing may be dismissed with prejudice.

For a more complete discussion of lottery procedures, see FCC INST 1159.1, released August 13, 1992. Additional information regarding the applicants for this lottery may be obtained from Consumer Assistance Branch at (717) 337-1212. Procedural questions concerning the lottery should be directed to William F. Caton at (202) 632-6410.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-134

In the Matter of

Price Cap Performance Review
For AT&T

REPORT

Adopted: June 24, 1993; Released: July 23, 1993

By the Commission:

I. INTRODUCTION

1. With this Report, we conclude our review of AT&T's performance during the first four years of price cap regulation. This review largely confirms our expectations for price caps: that it represents an improvement over rate of return regulation, combining lower rates with effective incentives for improved efficiency and innovative services. Under price caps, for example, the long distance rates paid by AT&T's residential customers fell by 5.3 percent, despite overall inflation in the American economy of 16.1 percent. Based on the record developed through ongoing monitoring of AT&T and the comments responding to the Notice of Inquiry (*NOI*) that opened this docket,[1] we believe that the AT&T price cap plan should continue for the basic schedule long distance services.

2. The success of the AT&T price cap plan in achieving the goals the Commission envisioned for it argues persuasively that revisions to any major component are unnecessary. Indeed, such revisions could be counter-productive.[2] Nonetheless, the record suggests that some relatively minor adjustments might enhance the plan's effectiveness. For this reason, we are adopting a Notice of Proposed Rulemaking to explore whether we should revise the AT&T price cap rules to make some or all of these adjustments.

II. THE AT&T PRICE CAP PLAN

3. The regulatory reform initiative known as the AT&T Price Cap Plan has now been in effect for almost four years. The purpose of this program was to create incentives for AT&T to provide services more efficiently, thus generating benefits to the carrier, its customers, and society that might otherwise be lost under rate of return regulation. In place of the complex and difficult administrative oversight of costs and earnings needed to enforce a reasonable rate of return, price caps sets direct limits on a carrier's prices. The effect is to replicate the marketplace forces of competition. Prices are held to a reasonable level by the cap, much as they are by the rivalry among companies in competitive markets. The carrier gains the opportunity to earn higher profits, but may do so only by operating more efficiently or by developing new services that customers want, not by raising overall prices. Moreover, the carrier has little incentive to misallocate costs among services, because its prices are not based upon cost allocations. Rather, the carrier is encouraged to apply its resources in the most efficient manner, as a means of increasing its productivity, and thus its profitability.

4. Another part of the price cap plan is periodic review to assure that it is functioning as intended. We undertook this review for AT&T as originally scheduled, during the fourth year of price caps, through the Notice of Inquiry (NOI) that opened this Docket. As we discussed there, based on our ongoing monitoring of AT&T, price caps appeared to have worked well. Under price caps, rates have fallen, the plan's incentives appear to have helped generate improved efficiency and innovation, and regulatory burdens have declined.[3]

5. In the NOI, we presented monitoring data we have collected regarding AT&T's performance under price caps and requested comment on our assessment of that performance. We requested comments on five specific issues, while inviting commenters to propose other changes they believe would improve the price cap plan. At the same time, we reemphasized our belief that "any proposed modifications should be designed to enhance the plan's ability to achieve the original goals."[4] We also expressly requested that the comments include all relevant information, and that information submitted should be as specific and quantitative as possible, emphasizing that general claims unsupported by the best available hard evidence would likely receive little weight.[5] We specifically requested AT&T to provide additional information regarding its earnings and service quality.[6]

III. Information and Comments Filed in Response to the NOI

6. Eight parties filed comments, and thirteen filed replies (*see* Appendix A); two studies of the effects of price caps were submitted. As part of its comments, AT&T filed a study prepared by Richard Schmalensee and Jeffrey H. Rohlfs (S-R Study)[7] which finds that "Price caps have been a big success in increasing efficiency and promoting consumer welfare."[8] The study concludes, as a preliminary estimate, that price caps yielded at least $1.8 billion in cumulative productivity gains from 1989 through 1991 in addition to gains in service quality. Moreover, although AT&T benefitted from increased profits, the study finds that the benefits from price caps largely flowed to cus-

[1] Price Cap Performance Review for AT&T, CC Docket No. 92-134, Notice of Inquiry, 7 FCC Rcd 5322 (1992).
[2] *See, e.g.*, para. 21, *infra*.
[3] *NOI*, 7 FCC Rcd at 5324.
[4] *NOI*, 7 FCC Rcd at 5326.
[5] *Id.*
[6] AT&T filed information in response to this request on July 31 and August 14, 1992. Letters from Joel E. Lubin to Donna Searcy, Secretary, July 31, 1992 and August 14, 1992.
[7] R. Schmalensee and J. Rohlfs, "Productivity Gains Resulting From Interstate Price Caps For AT&T," September 3, 1992, filed as an attachment to AT&T's Comments.
[8] *Id.* at 27.

tomers in the form of lower rates. The study concludes that customer benefits in lower prices, apart from the historical productivity growth of 2.5 percent built into the plan, were over 10 times the benefits to AT&T in higher profits; when historical productivity growth is included, customer benefits were 20 times the benefit to AT&T.

7. The other study, filed by Bell Atlantic and Pacific Bell, was prepared by William Taylor. The Taylor study concludes that FCC regulations, combined with changes in prices, incomes, and population were responsible for interstate toll reductions and increased demand that have benefitted customers since the divestiture of AT&T in 1984, and that interstate competition was not responsible for these benefits.

8. In a related matter, on Sept. 1, 1992, shortly before the date for comments in this docket, AT&T requested that the Commission waive price cap regulations for services it classified as "commercial" within price cap Basket 1. AT&T's petition was opposed in comments filed by CompTel, IDCMA, LCI International, MCI, Pacific Bell, and Sprint.[9]

IV. AT&T'S PERFORMANCE UNDER PRICE CAPS

9. As we discussed in the *NOI*, the monitoring data we have collected under price caps indicates that the plan has worked well. Data updated through the end of 1992 further support this assessment, as illustrated in the charts in the Appendix to this *Report*. Rates have remained at or below the caps (*Chart 1*), and have fallen overall. The results are summarized in Chart 2 of the Appendix, displaying both the allowable rates, as measured by the Price Cap Indexes (PCIs), and the actual rates, as measured by the Actual Price Indexes (APIs). For Basket 1 as a whole, rates have declined by 4.4 percent. For residential customers, the rate reductions have been even greater, 5.3 percent. These reductions were achieved during a period when overall inflation in the economy was 16.1 percent, as measured by the GNP Price Index. Thus, in real terms, at prices adjusted for inflation, residential customers benefitted from a 21 percent reduction in AT&T's long distance rates. Overall consumer benefits, including the effect of the consumer product dividend and amounts by which AT&T priced below caps, totaled about $1.8 billion. *Appendix, Chart 3.*

10. AT&T also responded to the profit incentives generated by price caps. During this period, AT&T's earnings have risen somewhat, but appear to be relatively low for the services that currently remain under price caps. AT&T reports overall interstate earnings of 11.0, 13.7, 13.4, and 12.77 percent in the first four years of price caps, 1989, 1990, 1991, and 1992. *Appendix, Chart 4.* In response to our request in the *NOI* for additional information on earnings in the residential and small business services in Basket 1 during the first three years of price caps, AT&T reports returns of 7.0 percent in 1989, 10.0 in 1990, and 7.4 percent in 1991, an average of 8.1 percent.

11. According to the S-R Study, AT&T also did in fact achieve the productivity growth the price cap plan was intended to encourage. Under price caps, AT&T reversed an upward trend in real noncapital costs (labor, materials, rents, and services) while thoroughly modernizing its network. The Study estimates that AT&T's cumulative productivity gains for interstate services during the years 1989 to 1991 were at least $1.8 billion greater than during the pre-price cap years 1986 to 1988, despite slower demand growth caused by the general economic recession that began in mid-1990.[10] As noted above, the Study also concludes that customers enjoyed 10 times the benefits in lower rates, through actual rate reductions and migration to lower cost services, than AT&T did in increased profits. The Study also suggests that customers enjoyed additional benefits in improved quality of service from AT&T's conversion of its network from analog to digital.[11] None of the other comments or replies address the S-R Study or its results, and the assumptions underlying the Study and its methodology may not have been closely examined. The Study does, however, appear to confirm other evidence of the benefits of price cap regulation to date.

12. The Commission's monitoring data also reflects the improvement of AT&T's infrastructure under price caps, notably in its technological sophistication. Total circuit counts increased from 1.595 million in 1988 to an estimated 1.968 million in 1993. AT&T increased its fiber optic cable mileage by 63 percent, from 704,731 in 1988 to 1,146,924 in 1991. As originally reported by AT&T, service quality as measured by the Equipment Blockage and Failure Index (EB&F) has been somewhat worse than in the period immediately proceeding price cap regulation, but has improved in recent reports. *Appendix, Charts 6(A) and 6(C).* However, AT&T has informed the Commission that its blockage reports have been erroneously high.[12] AT&T's corrected data would indicate that service quality was about the same or slightly better under price cap regulation, except for the 2nd half of 1989 (*Appendix, Charts 6(B) and 6(D)).* We are requesting further information and explanation of these corrections, and of AT&T's intention to revise the methodology for computing EB&F index figures, in the NPRM we are issuing today simultaneously with this Report.

13. AT&T has continued to introduce new price cap services. In addition to those discussed in the *NOI*, AT&T has recently introduced services such as: DIRECTory LINK (Tr. 4484), which permits completion of a call to the number provided by directory assistance without the need for a second long distance call; LDMTS Dial Station Access Control (Tr. 4553), which permits customers to control and restrict calling privileges from their telephones; and 800 Speech Recognition (Tr. 4841), which provides call routing options to 800 customers.

14. During this period, AT&T's share of the interstate market declined from 64.8 percent in its last quarter under rate of return regulation to 60.7 percent in 1992. *Chart 7.*

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[9] The issues raised by the waiver petition, oppositions and comments will be addressed in the rulemaking proceeding we are initiating today. *See* Revisions to Price Cap Rules for AT&T, CC Docket No. 93-197, Notice of Proposed Rulemaking, FCC 93-197, adopted June 24, 1993.

[10] *S-R Study* at 2, 5-15.

[11] *Id.* at 16-17.

[12] Letter from P.J. Aduskevicz, AT&T District Manager, Federal Government Affairs to Peyton Wynns, FCC, dated January 26, 1993.

V. COMMENTS ON THE AT&T PRICE CAP PLAN

15. Most commenters agree with our assessment in the *NOI* that price cap regulation appears to have worked well, though they differ as to the reasons why. Aside from AT&T itself, the commenters generally propose changes only in details of the plan. In this section of the Order, we review major features of the AT&T price cap plan, as well as the advantages and disadvantages of possible revisions to those features of the plan.

A. Services Subject To Price Caps

1. Background

16. Initially, price cap regulation was applied to three baskets of AT&T's services. Basket 2 included 800 Services, which provide toll-free inbound calling, generally to businesses. Basket 3 included services used by large businesses, such as private network, private line, and data transmission services. In our *Interexchange Proceeding*,[13] we concluded that the level of competition enjoyed by customers for these services warranted an even simpler regulatory framework. Streamlined regulation was adopted for Basket 3 (except for analog private lines) effective in October 1991. Streamlining of Basket 2 took effect in May, 1993, following the successful deployment of the technology for 800 number portability.[14]

17. Basket 1 contains residential and small business services, including the general schedule of interstate and international per call long distance rates. In 1991, in the *Interexchange Proceeding*, we concluded that the level of competition in Basket 1 service did not warrant removing these services from price cap regulation. For example, AT&T had generally priced Basket 2 and 3 services below the PCIs, the index establishing maximum prices under price caps, evidence that AT&T was setting prices in response to competition, not regulation. In contrast, Basket 1 services had generally been kept at the PCI. This indicated that the price cap limits, rather than competition, constrained prices for these services.

2. Basket 1 Services Generally

18. In its comments, AT&T contends that the Commission should eliminate price caps entirely and implement full streamlined regulation of all its services. It argues that all Basket 1 services are subject to vigorous competition, citing the large number of carriers offering services competitive with AT&T's Basket 1 offerings, and AT&T's declining market share.[15]

19. Complete streamlining of Basket 1 may be premature. While other carriers do compete with AT&T in all segments of Basket 1 services, AT&T still holds by far the largest market share of these carriers. Since 1989, AT&T has continued to provide about 60 percent of interstate minutes. The fact that AT&T has maintained overall Basket 1 prices at or near the price cap maximum also indicates that it may retain some ability to control its prices, in contrast to Basket 2 and 3 prices and ReachOut. In addition, the nature and extent of competition in interstate and international markets may well be affected by pending major decisions in areas such as local exchange interconnection and transport rates and rate structures. While AT&T's own S-R Study indicates that the benefits of price cap regulation to consumers have been substantial, the Taylor Study provides evidence that rate reductions in recent years have been a result of price cap regulation, not simply competition. For these reasons, it may be premature to replace price cap regulation for general schedule Basket 1 services, for which the plan appears to be functioning effectively to assure telephone subscribers reasonable rates while still granting AT&T substantial flexibility in its operations.

B. Productivity Factor

20. In the AT&T Price Cap Order, we set AT&T's productivity growth target at 3 percent per year after inflation. This figure was based on data indicating that productivity growth in telecommunications had historically been 2.5 percent greater than the general economy. We then added a 0.5 percent Consumer Productivity Dividend to assure that AT&T customers benefited from productivity gains expected under the price cap incentives.

21. In weighing the need for change in the productivity factor, a major consideration is whether the carrier's profits are substantially different from its cost of capital, an indication that actual productivity growth is substantially different from the target. However, it is also crucial to avoid changes to the productivity factor that might undercut the incentives price caps seeks to create. Under price caps, the incentive is based on profitability. AT&T is rewarded with higher profits if it achieves productivity growth above the target, and penalized with lower profits if it falls short. For this incentive to work properly, the productivity factor should not be changed either to recapture all profits, or to increase relatively low profits retroactively.

22. AT&T's earnings in Basket 1, according to AT&T's cost allocations and calculations, have been somewhat below its overall earnings and those permitted in prior years under rate of return regulation. However, AT&T's capital costs have also declined during this period as interest rates fell to their lowest levels in many years and its share prices have generally increased. The recession in the national economy was also in part responsible for relatively low growth in long distance traffic during this period, a trend that is likely to be reversed as the economy enters an expansionary phase of the business cycle. As the economy

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[13] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880 (1991), (*Interexchange Order), recon.*, 6 FCC Rcd 7569 (1991), (*Sua Sponte Reconsideration Order), further recon.*, 7 FCC Rcd 2677 (1992) (*Further Reconsideration Order), pets. for recon. pending; see* Competition in the Interstate Interexchange Marketplace, Memorandum Opinion and Order on Reconsideration, 8 FCC Rcd 2659 (1993).

[14] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Second Report and Order, FCC 93-258 (released May 14, 1993). Number portability refers to the ability of a customer to obtain service from any 800 service vendor, while retaining the same 800 number or selecting any available 800+seven digit number. Before May 1, 1993, the local exchange network technology switched 800 calls based upon blocks of 800 numbers to individual long distance carriers. Because an 800 number often represents a business address, this technology provided a competitive advantage to AT&T, which had the largest allocation of 800 numbers. Implementation of number portability removed this advantage.

[15] AT&T Comments at 14-26.

recovers, AT&T's productivity and profitability are likely to increase. As we discussed above, AT&T also chose to price some of its Basket 1 services below the cap, notably OCPs such as ReachOut, which may have reduced earnings for the Basket. In addition, none of the comments propose any change in the productivity factor, or provide any evidence for such a change. In the present case, these considerations support continuing the present 3 percent productivity factor.

C. Service Quality and Network Reliability

23. In the *NOI*, we discussed the importance of service quality and network reliability in any review of AT&T's performance under price caps. To monitor service quality, we have required AT&T to report its Equipment Blockage and Failure (EB&F) twice a year. To monitor network reliability we have required AT&T (as well as other carriers) to report all significant network outages promptly[16] and we investigate all significant network failures. The Commission also reviews AT&T's requests for authorization to construct lines under Section 214 of the Act.

24. In the *NOI* we requested comments on whether we should increase monitoring of AT&T's network reliability and service quality. In its comments, AT&T contends that additional monitoring is not necessary and argues that "Market forces and AT&T's long-standing commitment to maintaining the highest possible service standards ensure that AT&T's network is constantly upgraded to offer state-of-the-art reliability."[17] AT&T cites as evidence of its quality record the fact that on the busiest day of 1991, the AT&T network handled a record 157.8 million calls, with all but 211 getting through on the first try, a call completion ratio of 99.9999 percent.[18] AT&T also asserts that it has made substantial investment to improve network quality and reliability, including more than $3 billion overall in 1992 and $600 million during 1992 and 1993 on a range of network reliability projects. These include programs to reduce the risk and impact on customers of network cable cuts. AT&T also asserts that any new reporting requirements must apply to all facilities-based interexchange carriers.[19]

25. The Communications Workers of America urge active monitoring of "the adequacy of workforces for customers' demands" and adoption of service quality standards for all regulated carriers. CWA believes "that price cap regulation has been a contributing factor to excessive reductions in the workforce and consequent reduction in the quality of service provided to customers," including AT&T service disruptions such as the Thomas Street power outage. It notes that between 1984 and 1991 AT&T cut its workforce by almost a third.[20] AT&T replies that CWA's concerns are unfounded, agreeing with a Common Carrier Bureau investigation that found no evidence that the outage was attributable to price cap regulation. BellSouth contends that CWA's own statistics demonstrate that most of the downsizing of AT&T's workforce occurred prior to price cap regulation, and that the pace of downsizing has slowed under price caps. It also argues that price cap regulation provides incentives to match the work force to the load, and to provide adequate training.[21]

26. Bell Atlantic and Pacific Bell contend in their replies that the Commission should have uniform network reliability and service quality reporting requirements for all carriers, including interexchange carriers, local exchange carriers, and competitive access carriers.[22] Bell Atlantic proposes a separate proceeding for this purpose outside of the price cap review.

27. As we discuss in the companion NPRM adopted today, AT&T's revisions to its EB&F Index data and methodology warrant additional scrutiny to assure that the Index serves its intended function.[23] The record in this NOI does not, in our view, present persuasive reasons to consider other changes in our monitoring or reporting of AT&T's service quality. CWA's proposal for monitoring of employment levels would seem to bear only a distant relationship, if any, to service quality or network reliability. Its citation of a one-third decline in AT&T employees since divestiture, for example, bears no obvious relationship to AT&T's service quality or network reliability during that period. The Common Carrier Bureau's thorough investigation of the Thomas Street outage also found no basis for believing that price cap regulation bore any relationship to the power outage there.

28. In addition to price cap service quality monitoring, the Commission has taken an active role in assuring network reliability by all carriers, including AT&T. The Commission's adoption of new rules last year requiring the reporting of significant outages by carriers has laid the foundation for systematic and comprehensive approaches to resolving outage problems.[24] On June 10, the Commission's federal advisory committee, the Network Reliability Council, released a 1,000 page document that analyzes the causes of telephone service outages and provides recommendations as to how outages can be avoided. We expect AT&T's network - as well as other carriers' networks - will become even more reliable as the Council's recommendations are implemented. Finally, the Bell Atlantic and Pacific Bell proposals are essentially requests that we impose new reporting requirements on the LECs' emerging competitors, an issue outside the scope of this review of AT&T's performance under price caps.

D. Treatment of LEC and Other Access Charges

29. Under the AT&T price cap plan, changes in the access charge rates AT&T pays to LECs are considered exogenous, and thus result in adjustments to the AT&T price cap indexes. These rates have generally been declining and have helped produce lower AT&T rates. In the

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[16] *Amendment of Part 63 of the Commission's Rules to Provide for Notification by Common Carriers of Service Disruptions*, CC Docket No. 91-273, 7 FCC Rcd 2010 (1992).

[17] AT&T Comments at 55.

[18] *Id.* at 55.

[19] MCI states that it is "unaware" of any reason to increase monitoring. MCI Comments at 8.

[20] CWA Comments at 3, 5.

[21] BellSouth Reply at 4-5.

[22] Bell Atlantic Reply at 8; Pacific Bell Reply at 6.

[23] Revisions to Price Cap Rules for AT&T, CC Docket No. 93-197, FCC 93-327 (adopted June 24, 1993), paras. 114-17. *See also*, para. 35, *infra*.

[24] Section 63.100 of the Commission's Rules, 47 CFR Section 63.100.

AT&T Price Cap and *Reconsideration Orders*, we considered proposals by LECs that changes in charges by competing access providers (CAPs) and costs of bypass also be treated as exogenous. The LECs contended that all access costs should be treated alike and that excluding some forms of access from exogenous treatment creates a bias in favor of uneconomic bypass. The Commission rejected this contention. We considered, for example, that the small scale of CAP services and the competition among IXCs would prevent any actual bias, and that limiting exogenous treatment to LEC access cost changes created incentives for AT&T to negotiate efficient access arrangements.[25]

30. In the comments filed in this proceeding, several LECs again urge the Commission to change the AT&T price cap rules to treat LEC and other access charges similarly and to remove the bias that the current rules are said to create. They present several alternative proposals, including a requirement that all CAPs report the same data as LECs for inclusion in the AT&T price cap calculations (Pacific Bell),that the proportion of AT&T costs represented by LEC access costs be frozen at some fixed historical level (SW Bell), or that we eliminate exogenous treatment of LEC access charges (Ameritech).

31. AT&T urges rejections of these suggestions, contending that the LECs fail to show, and cannot show, changes in circumstances since the earlier Commission decisions and that they fail to address various rationales for the Commission's decisions. In addition, AT&T asserts that its services which use or permit its customers to use CAP access are not subject to price caps. It states that it obtains a small amount of dedicated, special access from CAPs for Tariff 12 services that have never been subject to price caps and for large business services that have been removed from price caps. Any switched access purchased by AT&T from CAPs is said to be *de minimis*.[26] MCI also contends that uniform treatment of LECs' and CAPs' is unnecessary, arguing that the LECs analysis of AT&T's incentives would hold true only if AT&T were a cost-plus monopoly provider, and thus interested only in holding its prices to the highest level allowable within the price cap formula. In the face of price competition, according to MCI, AT&T's prices would be disciplined by the marketplace, not the price cap.[27]

32. On the present record, we find no basis for changing our existing rule for computing AT&T's exogenous access costs. That rule has been effective in passing on actual access charge reductions to residential and small business customers. The only relevant major change in recent circumstances would appear to be our removal of almost all Basket 2 and 3 services from price cap regulation, a change that further reduces the likelihood that any actual bias exists. The services remaining under price caps are in Basket 1, and these services use LEC switched access almost exclusively, as AT&T points out. The LECs provide no evidence that including any *de minimis* CAP access in Basket 1 exogenous cost changes would affect AT&T's actual price cap indexes, and thus its incentives.

33. The Commission will be considering allowing interconnection to provide switched access in the near future. If switched interconnection occurs, the current method of calculating AT&T's exogenous access costs may create an actual bias, and any negative effects of this bias on competition among access providers and on customers may outweigh the considerations that support the current rules. We anticipate reexamining this issue in connection with the development of switched access competition.

E. Revisions to Price Cap Regulations

34. AT&T asserts that, if price cap regulation continues, the Commission should streamline that regulation to the fullest extent. Specifically, AT&T proposes: 1) eliminating its interstate earnings reports; 2) permitting tariff changes on 14 days' notice with a presumption of lawfulness; 3) eliminating service band price floors; 4) redefining "new" services under price caps; and 5) eliminating what AT&T views as unnecessary regulation of such "new" services.[28] Pacific Bell also supports removing service band floors and redefining new services, for all price cap carriers.[29] CompTel, on the other hand, contends that the Commission should tighten its existing Basket 1 regulations to limit AT&T's ability to leverage its market power over Basket 1 services. CompTel recommends separate service baskets and tight service bands within Basket 1 to protect consumers and competition without unduly restricting AT&T's pricing flexibility.[30] Sprint contends that even if AT&T's figures for its market shares are correct, they simply highlight AT&T's market dominance, and are in excess of that considered to define a "highly concentrated market."[31] Sprint does not oppose eliminating rate of return reporting requirements, but contends that in view of remaining competitive imbalances and AT&T's substantial existing regulatory flexibility, no further relaxation of regulatory oversight is warranted.[32]

35. The Commission recently examined the level of competition and market forces for interexchange services in the *Interexchange Proceeding*, and concluded that we should continue price cap regulation for the services in Basket 1 largely unchanged.[33] The record in this inquiry does not indicate that the market for Basket 1 services has changed substantially since that rulemaking was concluded in October 1991. For example, AT&T's overall market share has remained at about the same level. Moreover, the current regulations still appear to serve the public interest. Rate of return reporting permits monitoring of productivity perfor-

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[25] *AT&T Price Cap Order*, 4 FCC Rcd 2873, 3037 (1989), *Reconsideration Order*, 6 FCC Rcd 665, 673 (1991), *remanded on other grounds*, __ F.2d _____ (D.C. Cir. 1992).

[26] AT&T Reply at 19-20.

[27] MCI Reply at 7.

[28] AT&T Comments at 26-37.

[29] Pacific Bell Reply at 7-9.

[30] CompTel Reply at 3-6.

[31] Sprint Reply at 3-4, citing the Department of Justice definition under the Herfindahl-Hirschman Index of industry concentration.

[32] *Id.* at 4-5.

[33] We also considered the "new functionality" definition AT&T proposes for new services and found it unworkable and unnecessary for the creation of strong incentives to introduce new services in *Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access charge Subelements for Open Network Arechitecture Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 89-79, CC Docket No. 87-313, 7 FCC Rcd 5235, 5236 (1992). AT&T suggests that the problems of applying the "new functionality" test could be resolved by also defining new services with reference to the "like service" test in Section 202(a) of the Communications Act. We continue to view the change AT&T suggests as unnecessary, and also remain unconvinced that the "like service" test would prove a workable, beneficial replacement.

mance. The current tariff filing rules permit effective review of filings to evaluate their conformance with the price cap rules and the Communications Act. The service band floors do not preclude AT&T from setting lower rates, but only trigger a requirement for additional support information to demonstrate the rates will not be anti-competitive. Overall, these procedures appear to serve the public interest for Basket 1 services, and to impose modest burdens on AT&T. In view of the apparent success of price cap regulation, we see no need or benefit to changing regulations governing these services remaining under price caps.[34]

F. Other Revisions to the Price Cap Plan

36. We do believe that the record in this proceeding, as well as changes in circumstances, suggest that relatively minor adjustments in four areas of the AT&T price cap plan may enhance its effectiveness. First, Optional Calling Plans such as ReachOut are currently included in Basket 1 but appear to be subject to more effective competition than other services in that Basket. If this is the case, the public interest may be better served by removing these offerings from the price cap basket and into streamlined regulation. Second, AT&T's waiver petition[35] seeking removal of services used by commercial customers from Basket 1 is based on evidence that these services are also subject to effective competition, and that customers would therefore benefit from moving the services to streamlined regulation. However, the petition raises significant issues, including its use of restrictions on the availability of services to residential and business customers and the reasonableness of the separate rates, terms, and conditions. Third, the Commission's recent decision to remove all 800 Services except for 800 Directory Assistance from Basket 2 means that this relatively small service is subject to the same price cap rules and formulas as the much larger and more varied Basket 1 services. The analog private line services in Basket 3 are also projected to migrate into more modern digital services. These changes in the composition of these baskets may indicate that changes in the regulations applied to the baskets would be useful. Fourth, AT&T has recently informed the Commission staff that its reports on Equipment Blockage and Failure (EB&F), used to monitor service quality and network reliability, have been in error, and that AT&T has also begun to change the methodology used to compute the EB&F Indexes. These data corrections and methodology revisions raise concerns about whether we should clarify or revise our regulations to assure the usefulness of these reports. These issues are described in detail, and further comment is requested, in the companion Notice of Proposed Rulemaking we are adopting today.

VI. CONCLUSION

37. Our monitoring of AT&T's performance under price caps and the record in this Inquiry leads us to conclude that the price cap plan for AT&T should be retained. In particular, the current productivity factor and the current tariff regulations should remain unchanged. A few specific areas where relatively minor changes in the plan might improve its effectiveness will be the subject of further comment and the submission of further evidence in the NPRM we are also adopting today. While we are now terminating the current inquiry, we will continue to monitor AT&T and the interexchange marketplace to assure the continued effectiveness of the price cap regulations governing AT&T. Based on that monitoring, the evolution of telecommunications technology, operations, market structures, and our assessment of the public interest, the Commission is prepared to consider the merits of future changes in the AT&T price cap plan either through future comprehensive reviews, such as we have conducted here, or in more focused examination of specific issues. For the present, however, we will not set a specific schedule for such review. Rather, we expect that further review of the AT&T price cap plan will occur as the operation of the AT&T price cap plan and conditions in the interexchange market indicate that such review would be useful or necessary.

VII. ORDERING CLAUSES

38. Accordingly, IT IS ORDERED, that the Inquiry in this docket, CC Docket No. 92-134 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[34] In the *Interexchange Order*, in recognition of the growth in effective competition for private line and switched network services used typically by large businesses, we moved most Basket 3 services from price caps into streamlined regulation. We retained price caps for analog private line services, a shrinking category of services that is being replaced by digital technology, and is consequently less subject to competitive constraints.

ARINC repeats the request it made in its petition for reconsideration of the *Interexchange Order*, requesting that the Commission clarify which rate elements are considered analog private line services subject to price caps. ARINC also claims that AT&T had increased some analog private line rates by as much as 1000 percent in one year, and requests that, to prevent cross-subsidization, the FCC establish service bands of 5 percent or each element in Basket 3. AT&T opposes these requests, arguing that the services ARINC refers to, digital private line services connected to analog local channels, are not part of Basket 3 and are provided by other vendors. It also asserts that ARINC's calculation of rate increases is misleading, because it concerns only one rate element. According to AT&T, the tariff revisions increased the price of the service by between 3 to 5 percent.

The issue raised by ARINC will be resolved in the *Interexchange Order* reconsideration proceeding. We note, however, that we retained price cap regulation of analog private lines as a short-term protection for customers of these services, services which we expected would shrink as customers migrated to digital technology. Our expectation was that the need for price cap regulation of these services would end as this transition occurred. To help clarify the pace of this transition and the current need for continuing price cap regulation of Basket 3 analog private lines, we are requesting additional information and comment in the companion NPRM adopted today.

[35] *See* para. 8, *supra*.

APPENDIX A

Comments were filed by:

Aeronautical Radio (ARINC)

American Telephone and Telegraph Company (AT&T)

The Communications Workers of America (CWA)

The Interexchange Resellers Association and the

Telecommunications Marketing

Association (IRA/TMA)

MCI Communications, Inc. (MCI)

Southwestern Bell Telephone Company (SW Bell)

U.S. Sprint (Sprint)

The United States Telephone Association (USTA)

US WEST Communications, Inc. (US West)

Replies were filed by:

The Ameritech Operating Companies (Ameritech)

AT&T

The Bell Atlantic Telephone Companies (Bell Atlantic)

BellSouth Corporation (BellSouth)

The Competitive Telecommunications Association (CompTel)

The Independent Data Communications Manufacturers Association, Inc. (IDCMA)

MCI

Pacific Bell and Nevada Bell (Pacific Bell)

Sprint

SW Bell

USTA

US West

WilTel, Inc. (WilTel)

AT&T's Petition for Waiver of Price Cap Regulations for New Commercial Long Distance Service Classification

Oppositions were filed by:

CompTel

MCI

Comments were filed by:

IDCMA

LiTel Telecommunications Corporation (LCI)

Pacific Bell

Sprint

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Ameritech Operating Companies Revisions to Tariff F.C.C. No. 2	Transmittal No. 715
BellSouth Revisions to Tariff F.C.C. No. 1	Transmittal No. 118
Pacific Bell Revisions to Tariff F.C.C. No. 128	Transmittal No. 1633
Southwestern Bell Revisions to Tariff F.C.C. No. 73	Transmittal No. 2281
US West Revisions to Tariff F.C.C. No. 1	Transmittal No. 365

ORDER

Adopted: July 23, 1993; Released: July 23, 1993

By the Associate Bureau Chief, Common Carrier Bureau:

I. BACKGROUND

1. The captioned transmittals, filed June 11, 1993 and scheduled to become effective July 26, 1993, establish interstate access arrangements for the provision of Telecommunications Relay Service (TRS). As required by the Americans with Disabilities Act,[1] TRS enables persons with hearing or speech disabilities to communicate with others through arrangements that are functionally equivalent to conventional voice communications calls. As implemented by Section 64.604(b)(3) of the Commission's regulations, 47 C.F.R. § 64.604(b)(3), the statutory functional equivalence standard requires that TRS end users be enabled to select their interexchange carrier of choice.[2]

2. While TRS is offered to end users by interexchange carriers (IXCs) as a single, end-to-end call, the underlying provisioning arrangements involve two distinct connections. In one common TRS call configuration, an end user operating a text terminal first places an 800-service call to a TRS service bureau, where communications from the text terminal are translated by a trained communications assistant into speech, and vice versa. The assistant then establishes a second connection between the service bureau and the end user's called party, employing the end user's carrier of choice, and provides text-to-speech and speech-to-text translation for the duration of the call.[3] The captioned transmittals, and transmittals from other BOCs that were not petitioned against, tariff a new access connection arrangement between the TRS service bureau and the Bell Operating Company (BOC) access tandem office, at which the TRS call segment initiated at the service bureau is handed off to the IXC. The connection between the service bureau and the access tandem will be referred to in this Order as the "Bureau-Tandem Link" (BTL) to distinguish it from existing switched access rate elements.

3. All seven regional BOCs will employ generally consistent facility arrangements that will enable TRS service bureaus to more efficiently provide TRS with the capability of permitting TRS customers to use their carrier of choice.[4] Three of the captioned transmittals, those submitted by Ameritech, BellSouth and Southwestern Bell, were accompanied by applications for waiver of Part 69 of the Commission's Rules to establish new switched access rate elements for this approach to TRS implementation, and to charge for these elements on a flat rated basis.[5] The other transmittals would tariff an essentially similar arrangement by applying existing Part 69 rate elements. For the reasons discussed below, we grant the requested waivers and permit the TRS access tariffs to take effect.

II. PLEADINGS[6]

4. Sprint Communications Company L. P. (Sprint) filed a petition to reject the five captioned transmittals on June 28, 1993.[7] Sprint asserts that the "only efficient way" to comply with the carrier of choice requirement is to view TRS bureaus as carrier end offices. From this perspective, states Sprint, the TRS access structures proposed by Bell Atlantic and NYNEX, which treat the service bureau as a carrier end office and charge the transport element to IXCs, and which apply few if any Part 69 access elements to the service bureau, should be a model for TRS interstate

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[1] P.L. 101-336, July 26, 1990, 104 Stat. 366.

[2] Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, CC Docket No. 90-571, Report and Order and Request for Comments, 6 FCC Rcd 4657 at 4661-2, 4669 (1991) (*TRS I*).

[3] *See* Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, CC Docket No. 90-571, Order on Reconsideration, Second Report and Order, and Further Notice of Proposed Rulemaking, 8 FCC Rcd 1802 (1993) (*TRS II*); Third Report and Order, FCC 93-357, released July 20, 1993 (*TRS III*).

[4] Essentially, the arrangement allows the TRS bureau to route calls to the carrier of choice on an automatic basis with real-time billing. Informal discussions with BOCs indicate that the alternative arrangements will not be available to all TRS service bureaus, but TRS end users will be able to choose their preferred IXC even under the less efficient arrangements. *See, e.g.*, Southwestern Bell Reply at 2-3.

[5] Ameritech's waiver request was filed separately on June 8, 1993, and Southwestern Bell's request was filed on June 10, 1993. BellSouth filed its waiver request with its TRS tariff transmittal.

[6] Sprint's petition included contentions directed at Southern New England Telephone, and SNET filed reply comments. These issues were not properly raised absent a SNET tariff offering of TRS access, which was subsequently made by SNET Transmittal No. 572, filed July 9, 1993.

[7] A combined pleading cycle for petitions directed at TRS tariffs, and for comments on the waiver requests, was established by Public Notice, DA 93-707 (June 16, 1993). MCI Telecommunications Corporation (MCI) limited its filing to comments on the waiver requests. Sprint petitioned against the tariffs and included comments on the waiver requests, as noted in the accompanying text. Replies were filed by Ameritech, Pacific Bell, Southern New England Telephone (SNET), Southwestern Bell, and US West.

access tariffs. In contrast, Sprint argues, the captioned transmittals rely on unlawful rate structures, by failing to charge the IXC for access in an arrangement in which the TRS end user is clearly the IXC's customer. Sprint also asserts that the BOCs' use of different rate structures to tariff TRS access makes it difficult to audit and verify TRS bills, and will increase operating costs for TRS bureaus, to the detriment of TRS users and the general public. Sprint Petition at 5-6. Sprint asserts the Part 69 waivers requested by Ameritech, BellSouth and Southwestern Bell should be denied because they fail to demonstrate any unique circumstances confronted by those carriers, and because other BOCs are tariffing TRS access using existing Part 69 rate elements. Sprint asserts there is no suggestion that any financial burden would fall on these carriers if required to apply the recurring rate structure proposed by Bell Atlantic and NYNEX. *Id.* at 8-9.

5. Sprint also asserts that terms and conditions in two transmittals require revision to eliminate vague or unreasonable provisions. With respect to Southwestern Bell's tariff requirement that TRS providers furnish TRS usage data on a weekly basis in a specified format, Sprint states that Southwestern Bell has failed to explain why its access tandem cannot record usage data, why weekly reports are necessary, or why Southwestern Bell's chosen format should be required. *Id.* at 7. Sprint also states that Pacific Bell's tariff, which would provide TRS interconnection on an individual case basis (ICB), is unclear with respect to the application of switched local transport charges, and exemption from application of carrier common line and local switching charges. *Id.* at 7-8. Sprint also contends that contract rates proposed by SNET involve extremely high nonrecurring charges, and argues that any additional equal access costs incurred by SNET to provide TRS interconnection service should not result in higher rates, pursuant to the Commission's price cap policies. *Id.* at 9-10.

6. MCI comments that any Part 69 waivers granted for TRS elements should be granted only on an interim basis, pending industry discussions on how better to implement interconnection arrangements. MCI Comments at 1-4. MCI asserts that it, AT&T, and Sprint have negotiated a solution that appears to achieve equal access for TRS users by allowing interexchange carriers operating a TRS bureau to hand off relay calls to other carriers, and receive such hand offs. MCI states that industry discussions needed to resolve this approach have not been completed, but that the arrangement offered by Southwestern Bell in its waiver request is a more reasonable approach. *Id.* at 4-8. Finally, because MCI operates as a TRS provider in multiple jurisdictions, it recommends that a common recording format, delivery mechanism and delivery interval be adopted nationwide to control development and operations costs. *Id.* at 8-9.

7. Ameritech replies that its rate structure parallels the charging practice applicable to cellular mobile carriers, which also perform switching functions similar to an end office and are nonetheless charged for dedicated transport on a flat-rated, monthly basis. Ameritech Reply at 3. Ameritech adds that Sprint's assertion that IXCs should pay all transport from the TRS bureau is not consistent with Commission's cost causation policies or Ameritech's current method of ordering and provisioning access service to an access tandem. *Id.* at 4. Ameritech also contends that, if adopted, the switched interconnection arrangements under consideration by the Commission would make its proposed TRS rate structure necessary to avoid double recovery of costs when a competitive access provider furnishes the Bureau-Tandem Link. *Id.* Finally, with respect to MCI's comments on the waiver request, Ameritech states that MCI misunderstands the proposed service, and that while call processing information will be entered manually at the TRS center, the Ameritech arrangement is specifically designed to allow automatic, real-time transmission of billing data through the access tandem to the IXC. *Id.*[8]

8. Pacific Bell replies that Sprint's characterization of its TRS bureau as an end office is irrelevant to the lawfulness of Pacific Bell's TRS tariff. Pacific states that while the TRS bureau performs some functions similar to those provided by a LEC end office, the dedicated facility provided for the Bureau-Tandem Link is not provided as part of Feature Group D trunk service, and there is no basis for providing this without appropriate rates. Pacific also asserts that the TRS bureau lacks significant end office characteristics, and does not terminate customer station loops nor receive central office code assignments with line numbers for customer identification. Pacific also warns that treating customer facilities such as TRS bureaus as end offices could result in requests from commercial entities with large call volumes, which do not provide local exchange service but wish to have their facilities designated as end offices for better rate treatment. Pacific Bell Reply at 3-5.

9. Pacific also asserts that audit and verification of TRS bills is not the burdensome task suggested by Sprint, because only two basic rate structures have been proposed. According to Pacific, the only substantial distinction between the multiple TRS tariff structures is that between a dedicated facility approach, such as adopted by Pacific, and a structure proposed by, *e.g.*, NYNEX, based on non-dedicated facilities. In Pacific's view, the same public will bear TRS costs whether they are initially incurred by TRS bureaus or by the IXC of choice. *Id.* at 5-7. Pacific also agrees to clarify the tariff language Sprint identified as ambiguous.

10. Southwestern Bell first replies that it has no obligation to offer this alternative arrangement for TRS. According to Southwestern Bell, existing Feature Group A (line side) services enable the TRS provider to use 10XXX dialing to transfer TRS end users to their carrier of choice. Thus, says Southwestern Bell, should the Commission reject its transmittal, it is under no obligation to provide an alternative TRS access arrangement resembling the NYNEX or Bell Atlantic arrangements, as Sprint suggests in its petition.[9] Southwestern Bell Reply at 2-3. Southwestern disagrees with Sprint's characterization of the TRS bureau as an end office and describes technical differences between end offices and the TRS provider.[10] Even if the TRS center is regarded as an end office, Southwestern

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[8] Ameritech also notes that it will modify its TRS platforms in Michigan and Ohio so that necessary Automatic Number Identification (ANI) digits will be generated by July 26, 1993. Ameritech Reply at 5.

[9] Sprint had suggested that if the Commission rejected the captioned TRS transmittals, it should authorize the affected carriers to implement "on short notice" the TRS access structures proposed by Bell Atlantic or NYNEX. Sprint Petition at 4.

[10] Southwestern notes that TRS providers do not handle ter-

asserts, it would still expect to bill the TRS provider for the cost of the TRS bureau's connection to the access tandem, as it already does for cellular mobile carriers. *Id.* at 4-6. Finally, as to the usage reporting requirements challenged by Sprint, Southwestern states that its tandem switches lack the capability to record originating FGD traffic, and that obtaining usage recordings from the source of the traffic is no different than the process used for connections provided to cellular carriers. *Id.* at 6-8. With regard to its waiver request, Southwestern states that because no rate structure for TRS access has been mandated, a Commission conclusion that the arrangement offers additional benefits to consumers is sufficient ground to justify grant of a waiver. *Id.* at 9.

11. US West replies that the TRS provider is not a LEC end office, and US West incurs costs to provide TRS access that it does not incur without the intermediary TRS bureau. Because transport between the TRS bureau and the associated serving wire center is not currently recovered by the existing access rate structure, US West contends, it is not unreasonable to require the TRS provider to pay for that transport. US West Reply at 2-5. US West states the structure proposed for TRS is virtually identical to that established for other intermediary service providers, such as radio common carriers and cellular service providers. *Id.* at 5-6. As to Sprint's contention that multiple rate structures for TRS access arrangements should be conformed to a single standard, US West states the Commission has not mandated a particular rate design, and should not do so absent demonstrations of actual harm to TRS providers. *Id.* at 7-8.

III. DISCUSSION

12. Timely and efficient implementation of the ADA is a Commission priority due to its importance to persons with disabilities who, through TRS, will be better able to communicate with persons without disabilities. The TRS orders establishing cost recovery procedures for this service have not mandated a rate structure for the TRS access arrangements. Moreover, the interim rate structure established for local transport does not contemplate TRS bureaus, which appear to have some attributes of end offices and resemble end users in other respects. In these circumstances, the Common Carrier Bureau believes the better course is to grant a blanket waiver of its Part 69 rules to local exchange carriers for the limited purpose of offering TRS access,[11] until October 31, 1995, when the interim local transport structure is scheduled to be replaced.[12]

13. The blanket waiver applies only to one physical segment of the TRS access arrangement, the connection between the TRS bureau and the associated LEC serving wire center. The different rate structure approaches do not appear to create significant burdens on the implementation of TRS, nor will they affect rates for TRS end users more than minimally. In the event that subsequent TRS access filings compromise the purposes of the ADA, we will re-examine whether a more constrained approach is warranted. This approach will serve both to expedite the implementation of the carrier of choice capability by the captioned carriers and will enable other carriers to employ different rate structures as they consider necessary, without seeking waiver in each instance.[13] This will be particularly important as the number of TRS bureaus expands.

14. As to the other issues asserted by Sprint, the Common Carrier Bureau has reviewed the captioned TRS access filings submitted by the several Bell Operating Companies, Sprint's petition, the BOCs' replies, and subsequent corrective transmittals. We conclude that none of the captioned filings warrant rejection because each does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

15. IT IS THEREFORE ORDERED that, pursuant to Section 0.291, the Common Carrier Bureau, on its own motion, GRANTS a blanket waiver of Part 69 of the Commission's Rules, to the extent necessary to enable all local exchange carriers to tariff interstate access rate elements that reasonably reflect facility arrangements for transport between TRS service bureaus and associated access tandem switches, in order to comport with requirements of the Americans with Disabilities Act and the Commission's Rules implementing that Act, until October 31, 1995.

16. IT IS FURTHER ORDERED that the petition to partially reject or suspend and investigate Ameritech Operating Companies Transmittal No. 715, BellSouth Transmittal No. 118, Pacific Bell Transmittal No. 1633, Southwestern Bell Transmittal No. 2281, and US West Transmittal No. 365, filed by Sprint Communications Company L.P., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Jill Ross Meltzer
Associate Bureau Chief
Common Carrier Bureau

minating traffic, do not directly provide dial tone to any end user, and are not connected to customer loop terminations. Southwestern Reply at 4.

[11] Of course, this flexibility does not alter carriers' responsibility to comply with the ADA and Section 64.604 of the Rules, which establishes mandatory minimum standards for TRS providers.

[12] Transport Rate Structure and Pricing, Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 91-213, 7 FCC Rcd 7006, 7010-11 (1992), *recon.*, FCC 93-366 (released July 21, 1993).

[13] *See* Cellular Telecommunications Industry Association, 8 FCC Rcd 1412 (1993). There, the Common Carrier Bureau extended an interim, blanket waiver of rules applicable to certain nondominant carriers pending action on permanent rule changes.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: July 26, 1993

Comments Invited on Industry Proposal for Compatibility Between Cable Systems and Consumer Electronics Equipment

ET Docket No. 93-7

In the *Notice of Inquiry* in ET Docket No. 93-7, the Commission solicited information regarding means of assuring compatibility between consumer electronics equipment and cable systems. This action was the first step towards the implementation of Section 17 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385.

On July 21, 1993, Supplemental Comments were filed by the Cable-Consumer Electronics Compatibility Advisory Group, consisting of representatives of the cable and consumer electronics industries. These comments identify a set of measures that can be implemented in the short-term to help address issues of compatibility between cable systems and consumer electronics equipment. The comments also conclude that longer-term measures can bring substantial changes in the relationship between cable systems and consumer electronics products.

This filing contains new information that is important to the resolution of the issues before the Commission in this docket. Accordingly, we are requesting comments on this filing. Copies of the filing are available for inspection in the ET Docket No. 93-7 file at the FCC Reference Center (Room 239), 1919 M Street N.W., Washington, DC 20554. Copies may also be obtained from International Transcription Service, Inc., (202) 857-3800. Comments are requested by August 10, 1993.

For further information, contact Alan Stillwell, Office of Engineering and Technology, (202) 653-8162.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

The Hinton Telephone Company of Hinton, Oklahoma, Inc. — File No. 163500-92-1-BFW

Notice of Apparent Liability for Forfeiture Penalty for Station WQZ687 in the Public Land Mobile Service at Colony, Oklahoma

MEMORANDUM OPINION AND ORDER ON REVIEW

Adopted: July 20, 1993; **Released: August 3, 1993**

By the Commission:

I. INTRODUCTION

1. The Hinton Telephone Company of Oklahoma, Inc. (Hinton) has filed an Application for Review seeking cancellation of a forfeiture set forth in a Common Carrier Bureau (Bureau) order[1] which granted in part and denied in all other respects Hinton's request for remission or reduction of a Notice of Apparent Liability for Forfeiture (*NALF*) the Mobile Services Division (MSD) previously had issued.[2] For the reasons stated below, we deny Hinton's Application for Review.

II. BACKGROUND

2. In February 1988, a stock reorganization of Hinton took place which resulted in a *pro forma* transfer of control from John R. Hollis to John R. Hollis 1988 Revocable Trust, John R. Hollis, Trustee. Contrary to Commission rules, Commission approval was not sought at that time. In August 1991, Hinton eventually filed an application for Commission consent to the *pro forma* transfer of control of Hinton. The MSD subsequently issued the *NALF* in November 1991.

3. In the *NALF*, the MSD found that an apparent violation of Section 310(d) of the Communications Act of 1934 (the Act) and Section 22.39(a) of the Commission's Rules had occurred based upon the unauthorized *pro forma* transfer of control. Pursuant to our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991) (*Policy Statement*), *recon. denied*, 7 FCC Rcd 5339 (1992), *petition for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992), the MSD stated that the base forfeiture amount for an unauthorized *pro forma* transfer of control is $10,000, but because Hinton voluntarily disclosed the unauthorized *pro forma* transfer of control, the MSD reduced the forfeiture to $7,000.

4. Hinton filed a Request for Remission or Reduction of the forfeiture, raising a series of objections to the *NALF* issued by MSD. The Bureau rejected these objections, except that it did accept Hinton's contention that the forfeiture should be adjusted downward because of Hinton's history of overall compliance and, consequently, it reduced the $7,000 forfeiture to $5,000.

III. HINTON'S APPLICATION FOR REVIEW

5. Hinton argues that the *Policy Statement*'s "Table of Fines" (*i.e.*, the "Standards for Assessing FCC Forfeitures" Appendix) is unlawful because both the *Policy Statement* and Table of Fines constituted adoption of a rule which was not preceded by prior notice and comment. It asserts that the Commission is wrong in concluding that notice-and-comment-procedures were not required before adopting the Table of Fines and that Commission failure to invite comments resulted in a lack of justification for the Table's "percentage-of-the-maximum-fine" formula, which were "plucked out of thin air." Moreover, Hinton contends that the percentage-of-maximum-fine formula is inconsistent with Section 503(b)(2) of the Act. According to Hinton, a common carrier begins at a four-to-one dollar-amount disadvantage in relation to a broadcaster or cable operator for comparable offenses but nothing in Section 503 suggests that the type of licensee should or might be controlling in determining the amount of a forfeiture. Moreover, it asserts that the formula for developing fines departs without explanation from Section 1.80(b)(3) of the Commission's Rules,[3] and that because the Commission neither acknowledged the existence of Section 1.80(b)(4) of the Rules[4] nor explained why its Table of Fines is preferable to the factors set forth in Section 1.80(b)(4), both failures deviate from the "Rule of Law."

6. Hinton also alleges that the $5,000 forfeiture is inequitable and arbitrary and, thus, unlawful because it does not account for Hinton's inability to pay due to a negative net income of $46,000 over the last three years, and because the Bureau has treated Hinton the same as companies, such as New York Telephone and Southwestern Bell Telephone Company, which have not experienced such negative net incomes. In addition, Hinton argues that

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[1] *The Hinton Telephone Company of Hinton, Oklahoma, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 6643 (Com. Car. Bur. 1992) (*Hinton Order*).

[2] *The Hinton Telephone Company of Hinton, Oklahoma, Inc.*, Notice of Apparent Liability, 7 FCC Rcd 74 (Mobile Serv. Div. 1991).

[3] Section 1.80(b)(3), in relevant part, provides:

> ... the amount of any forfeiture penalty determined under this section shall not exceed $10,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $75,000 for any single act or failure to act described in paragraph (a) of this section.

[4] Section 1.80(b)(4) provides:

> *Factors considered in determining the amount of the forfeiture penalty.* In determining the amount of the forfeiture penalty, the Commission or its designee will take into account the nature, circumstances, extent and gravity of the violations and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.

retroactive application of the Table of Fines was unlawful. In support, it asserts that although the unauthorized *pro forma* transfer of control occurred and was complete on February 28, 1988, the Table of Fines became effective in August 1991, some three and one-half years later and the Bureau applied the table to establish the forfeiture for the unauthorized transfer.

IV. DISCUSSION

7. Upon review of the record and the conclusions previously reached in the *NALF* and the *Hinton Order*, we find that the Bureau's conclusions were not in error and did not violate the Act or our Rules.

8. Hinton's argument regarding the lack of notice and comment for the *Policy Statement* has already been addressed. *See Memorandum Opinion and Order on Reconsideration*, 7 FCC Rcd at 5339-40. The base forfeiture amounts for common carriers set forth in the *Policy Statement* reflect the higher maximum amounts for common carriers set by Congress when it increased the Commission's forfeiture authority, and also permissibly impose higher penalties on common carriers than on other entities for comparable offenses. Thus, there is no inconsistency with Section 503(b)(2) of the Act. We reject Hinton's claims involving the formula for fines *vis-a-vis* Section 1.80(b)(3) and Hinton's claims surrounding Section 1.80(b)(4). It is readily apparent that the $5,000 forfeiture assessed Hinton in no way violates Section 1.80(b)(3) nor is this subsection relevant to common carriers. Furthermore, the adjustment factors in the *Policy Statement* closely track the statutory factors repeated in Section 1.80(b)(4). Because the Commission and the staff will continue to evaluate all evidence in the record of a particular case regarding the factors set forth in the Act and the rules, including any equitable arguments made by a licensee, the *Policy Statement* is consistent with Section 1.80(b)(4). *See Memorandum Opinion and Order on Reconsideration*, 7 FCC Rcd at 5340.

9. Hinton's claim of inability to pay the $5,000 forfeiture is meritless. The Commission previously has stated that, "[i]n general, a licensee's gross revenues are the best indicator of its ability to pay a forfeiture" and that use of gross revenues in determining a party's ability to pay is "both reasonable and appropriate and, moreover, a very useful yardstick in helping to analyze a company's financial condition *for forfeiture purposes*." *PJB Communications of Virginia, Inc.*, 7 FCC Rcd 2088-89 (1992) (*PJB*) (emphasis supplied). The Bureau was fully aware of Hinton's negative net income of $46,000 (*see Hinton Order* at footnote 6) when it reached its decision finding that Hinton was able to pay the higher $7,000 established by MSD's *NALF*. Here, Hinton has not shown an inability to pay a $5,000 forfeiture (which now is only 0.0020 percent of Hinton's $2,507,353.53 total operating revenues for the period ending December 31, 1991).

10. Hinton's assertion of unlawful retroactive application of the *Policy Statement* is also rejected. The Bureau, in the *Hinton Order*, correctly pointed out that Hinton's violation continued from February 1988, to at least August 23, 1991 (when Hinton ultimately filed its application for Commission consent to the *pro forma* transfer of control) past the August 8, 1991 effective date of the *Policy Statement*. Therefore, there was no unlawful retroactive application of the forfeiture.[5]

11. As a result, we find no basis upon which to grant Hinton's Application for Review.

V. ORDERING PARAGRAPHS

12. Accordingly, IT IS ORDERED that the Application for Review filed by The Hinton Telephone Company of Hinton, Oklahoma, Inc. in the above-captioned proceeding IS DENIED.

13. IT IS FURTHER ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, 47 U.S.C. § 503(b), and Section 1.80(f)(4) of the Commission's Rules, 47 C. F. R. § 1.80(f)(4), that The Hinton Telephone Company of Hinton, Oklahoma, Inc. SHALL FORFEIT to the United States the sum of five thousand dollars ($5,000) for violation of Section 310(d) of the Communications Act of 1934, and Section 22.39(a) of the Commission's Rules. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission, payable to the order of the Federal Communications Commission, within thirty (30) days from the date of this Order, to: Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

14. IT IS FURTHER ORDERED that if the forfeiture is not paid within the period specified, the case will be referred to the Department of Justice for collection pursuant to Section 504(a) of the Communications Act of 1934, 47 U.S.C. § 504(a).

15. IT IS FURTHER ORDERED that a copy of this Order BE SENT to The Hinton Telephone Company of Hinton, Oklahoma, Inc., P. O. Box 1040, 200 West Main Street, Hinton, Oklahoma 73047, by Certified Mail, Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[5] In any event, even if the *Policy Statement* were not applicable, the Act authorizes a forfeiture of up to $1,000,000 for a continuing violation by a common carrier, and we believe a $5,000 forfeiture is appropriate under the facts and circumstances here.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-487

In re Applications of

GOODLETTSVILLE BROADCASTING COMPANY, INC.	File No. BPH-861215MI
SAR BROADCASTING, INC.	File No. BPH-861216MB
BLEDSOE COMMUNICATIONS, LTD.	File No. BPH-861216MD
HEIDELBERG-STONE BROADCASTING COMPANY	File No. BPH-861217MA
GOODLETTSVILLE COMMUNITY BROADCASTING, INC.	File No. BPH-861217MM
WILLIAM E. BENNS, III	File No. BPH-861217MQ
TENNESSEE WOMEN IN BROADCASTING, INC.	File No. BPH-861217MT
RICHARD S. FRANCIS	File No. BPH-861217NA

For Construction Permit for
New FM Station, Channel 246C2,
Goodlettsville, Tennessee

MEMORANDUM OPINION AND ORDER

Adopted: July 19, 1993; Released: August 3, 1993

By the Commission:

1. By this memorandum opinion and order, we affirm with minor modifications the Review Board's decision in the above-captioned proceeding granting the application of Heidelberg-Stone Broadcasting Company for a new FM station in Goodlettsville, Tennessee. We also deny a motion to reopen the record and enlarge the issues seeking the addition of reporting and lack of candor issues against Heidelberg-Stone.

BACKGROUND

2. The Review Board affirmed the Supplemental Initial Decision of Administrative Law Judge Joseph Chachkin granting Heidelberg-Stone's application based upon the quantitative and qualitative superiority of its integration proposal, and denying the competing applications of Goodlettsville Broadcasting Company (GBC), SAR Broadcasting (SAR), Bledsoe Communications (Bledsoe), Goodlettsville Community Broadcasting, Inc. (GCBI), William E. Benns (Benns), Tennessee Women in Broadcasting (TWIB), and Richard S. Frances (Frances). *Goodlettsville Broadcasting Company*, 8 FCC Rcd 57 (Rev. Bd. 1992), affirming. *Supplemental Initial Decision*, 7 FCC Rcd 2528 (ALJ 1992).

3. Each of the seven unsuccessful applicants has filed an application for review of the Review Board's decision.[1] In addition, Benns has filed a motion to reopen the record and enlarge the issues, seeking the addition of reporting and lack of candor issues against Heidelberg-Stone for its failure to report that, despite its claimed enhancement credit for area residence, its 49% owner, Katherine Stone, no longer resides in the service area.[2] Various procedural requests have also been filed.[3]

[1] In addition to the pleadings listed in notes 2 and 3 below, the following pleadings are pending before the Commission: (a) an application for review, filed January 29, 1993, by SAR Broadcasting, Inc.; (b) an application for review, filed February 1, 1993, by Richard S. Frances; (c) an application for review, filed January 21, 1993, by William E. Benns, III; (d) an application for review, filed February 1, 1993, by Goodlettsville Community Broadcasting, Inc.; (e) an application for review, filed January 29, 1993, by Bledsoe Communications, Ltd.; (f) an application for review, filed February 1, 1993, by Goodlettsville Broadcasting Company; (g) an application for review, filed February 1, 1993, and a request for permission to file application for review in excess of ten pages or for permission to file an amended application for review, filed March 8, 1993, by Tennessee Women In Broadcasting; (h) consolidated opposition, filed February 16, 1993, by William E. Benns; (i) an opposition to GBC's application for review, filed February 16, 1993, by Heidelberg-Stone; (j) a motion to strike and an opposition to TWIB's application for review, filed February 16, 1993, by Heidelberg-Stone; (k) an opposition to Benns' application for review, filed February 16, 1993, by Heidelberg-Stone; (l) an opposition to Francis' application for review, filed February 16, 1993, by Heidelberg-Stone; (m) an opposition to GCBI's application for review, filed February 16, 1993, by Heidelberg-Stone; (n) an opposition to Bledsoe's application for review, filed February 16, 1993, by Heidelberg-Stone; (o) an opposition to applications for review, filed February 16, 1993, by GBC; and (p) an opposition to TWIB's request for permission to file application for review in excess of ten pages or for permission to file an amended application for review.

[2] Benns filed a motion to reopen the record and enlarge the issues against Heidelberg-Stone on March 1, 1993. GBC filed comments in support of Benns' motion on March 11, 1993. An opposition to Benns' motion, and an addendum thereto, was filed by Heidelberg-Stone on March 16, and 23, 1993, respectively. In addition, Heidelberg-Stone filed a reply to GBC's comments on March 22, 1993. Benns filed a reply to opposition to motion to reopen the record on March 26, 1993.

[3] On March 16, 1993, Heidelberg-Stone filed a motion to dismiss Benns' application. In response, Benns filed an opposition to motion to dismiss on March 24, 1993. Heidelberg seeks the dismissal of Benns' application for failure to prosecute its application. It relies on 47 C.F.R. § 1.276(f), which provides that the application of a party failing to file timely exceptions following an adverse initial decision may be dismissed for failure to prosecute. Notwithstanding Heidelberg-Stone's assertion, however, Benns timely filed exceptions, which objected to Heidelberg-Stone's qualifications and to the denial of its application. Benns' alleged failure to "point out [in its exceptions] with particularity alleged material errors in the decision" is not a sufficient basis for dismissing its application for failure to prosecute. The motion to dismiss is therefore denied.

THE STANDARD COMPARATIVE ISSUE

4. In selecting Heidelberg-Stone as the comparative winner, the Board held that four applicants -- SAR, Bledsoe, Benns, and TWIB[4] -- were clearly out of the running, as they either received diversification demerits and/or significantly less than 100% full-time integration credit. Two others (Francis and GCBI) were found by the Board to rank behind Heidelberg-Stone and GBC, in terms of residence/civic activities.

5. As between Heidelberg-Stone and GBC,[5] we agree with the Board that Heidelberg-Stone's advantages for minority ownership (51% to GBC's 0%) and for broadcast experience (51% to GBC's 20%) outweigh GBC's advantage for residence/civic activities, particularly since GBC's advantage under that factor derives principally from more long-term residence and is not significantly increased by civic involvement.[6] [7] Although all GBC owners are long-term residents, we note that, with only minimal civic participation by three GBC owners (60%) and somewhat more significant involvement by two (40%), GBC warrants less than the maximum possible credit under the unified residence/civic factor.[8] Its advantage under this factor is further diminished by the fact that John Heidelberg, 51% owner of Heidelberg-Stone, is also a long-term resident, that its 49% owner Katherine Stone is a short-term area resident,[9] and that both have been civically involved.[10] We note further that Heidelberg-Stone, with only 51% minority ownership, likewise warrants less than maximum credit on this factor, but that GBC offers no minority ownership that offsets Heidelberg-Stone's credit on this factor.

MOTION TO REOPEN THE RECORD AND ENLARGE THE ISSUES

6. Having concluded that Heidelberg-Stone is the comparative winner, we proceed to consider Benns' motion to reopen the record and enlarge the issues. For the reasons set forth below, we find that Benns has not raised in a timely manner a substantial and material question likely to affect the outcome of the proceeding, let alone satisfied the particularly strong showing of substantive sufficiency required where an applicant seeks to reopen and enlarge the issues following the close of the record.[11]

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[4] TWIB argues that the Commission's consideration of diversification and of area residence/civic involvement violates the first amendment in that both policies are intended to promote diversity of viewpoint, thereby affecting broadcast content. However, the Court has held that those policies, while intended to promote diversity of viewpoint, entail a structural approach that is content-neutral in that it "allows the FCC to assess the *likelihood* that a broadcaster will present diverse views, without having to assay the actual diversity of the views themselves." *Committee for Communications Access v. FCC*, 737 F.2d 74, 79 (D.C. Cir. 1984) (emphasis in the original). See also *Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37, 54 (D.C. Cir. 1978); *TV 9, Inc. v. FCC*, 495 F.2d 929, 938 (D.C. Cir. 1973), cert. denied, 419 U.S. 986 (1974).

[5] Because we agree with the Board that GBC is qualitatively inferior to Heidelberg-Stone, we, like the Board, have not considered, and therefore express no opinion upon, the various challenges to the ALJ's award of full integration credit to GBC.

[6] There is no merit to the claim that the Board understated GBC's civic involvement. It claims that three 20% owners, Eleanor Mead, Helen Smith, and Whitson Adamson, have extensive civic records. The ALJ found that Mead and Smith were the only owners with more than minimal civic involvement (7 FCC Rcd at 2529). On appeal, the Board properly found that their activities merited little weight because the most significant involvement post-dated the filing of the application. 8 FCC Rcd at 62 ¶ 20. See *Beach Broadcasting Limited Partnership*, 6 FCC Rcd 4485 ¶ 2 (1991). As to Adamson, he served as media representative over a 15 year period for various civic organizations; he has also served as a volunteer teacher at Aquinas Junior College, and Middle Tennesse State University, both of which are located in GBC's proposed 1 mV/m contour. His service as "media representative," rather than as a member of area organizations is not creditable, and his teaching activities merit only minimal credit. See *Eve Ackerman*, 7 FCC Rcd 2493, 2496-97 & ¶ 15 & n.12 (Rev. Bd.1992), review denied, 7 FCC Rcd 6872 (1992), citing *Broadcast Associates*, 100 FCC 2d 616 (Rev. Bd. 1985) (job-related activities are creditable but only if they entail membership rather than observation).

[7] Nor is GBC correct that broadcast experience is a "wash," because of the experience of GBC's 20% owner Whitson Adamson. The Board properly preferred Heidelberg-Stone on this factor given Heidelberg's 51% interest and that he has worked at broadcast stations significantly longer than GBC's Adamson. 8 FCC Rcd at 62 ¶ 23. Even if GBC's residence/civic advantage and Heidelberg-Stone's minority ownership advantage were equal, the Board is correct that broadcast experience would dictate the grant of Heidelberg-Stone's application.

[8] While all five of GBC's 20% owners are long-term residents of the service area, we note that Eleanor Mead (a service area resident since 1972) has lived in Goodlettsville since 1985, and that Dorothy Sheppard (a service area resident since 1967) lived there from 1968 to 1977. *Supplemental Initial Decision*, 7 FCC Rcd at 2529 ¶ ¶ 6-7, and in a community immediately adjacent to Goodlettsville from 1977 to 1984. *Initial Decision*, 5 FCC Rcd at 3983 ¶ 255. See *Ronald Sorenson*, 6 FCC Rcd 1952, 1954 n.2 (1991). The additional residence of Mead and Sheppard in Goodlettsville or in an immediately adjacent community, which is not seriously disputed, was apparently not considered by the Review Board. 8 FCC Rcd at 61-62 ¶ ¶ 20-23. However, Mead's residence in Goodlettsville since 1985 and Sheppard's previous residence there are largely offset by John Heidelberg's (51% owner of Heidelberg-Stone) residence in Goodlettsville since February 1987. *Id.* at ¶ 22. In any event, credit for service area residence closely follows credit for local residence. *Waters Broadcasting Corp.*, 91 FCC 2d 1260, 1262-63 ¶ ¶ 3-6 (1981). Thus, the slightly greater credit due GBC for some local residence does not materially enhance its advantage over Heidelberg-Stone under the combined residence/civic factor.

[9] Heidelberg-Stone received comparative credit under residence/civic factor for the continuous full-time residence of its 49% owner, Katherine Stone, in the service area and for her pledge to continue living there. As reflected below, however, Stone established a second residence in Arkansas, and for at least a year Stone has divided her time between the two residences, but she has reaffirmed her pledge to reside full-time in the service area upon the grant of Heidelberg-Stone's application. See ¶ 16, infra. That Stone has been only a part-time resident of the service area during this time does not materially diminish Heidelberg-Stone's residence/civic showing. In this regard, Stone moved into the service area in July 1985, less than two years before the filing of Heidelberg-Stone's application, and thus Heidelberg-Stone received very little comparative credit for her past residence and civic activities. Heidelberg-Stone's very slight credit for Stone's past service area residence/civic involvement is therefore only minimally diminished by her part-time residence in Arkansas.

[10] See *Great Lakes Broadcasting*, FCC 93-263 ¶ 9 (released June 11, 1993).

[11] See *Eve Ackerman*, FCC 93-308 ¶ 6 (released June 23, 1993); *Evergreen Broadcasting Company*, 7 FCC Rcd 6601, 6602 ¶ ¶ 7-8

7. *Benns' Motion.* Benns seeks the addition of reporting and lack of candor issues against Heidelberg-Stone. It alleges that more than a year ago Heidelberg-Stone's 49% owner, Katherine Stone, moved from Cottonwood, Tennessee, which is inside the service area, to Hamburg, Arkansas, and that this change of residence should have been reported pursuant to C.F.R. § 1.65. Noting that Heidelberg-Stone sought and received enhancement credit for Stone's residence and that the grant of its application turned upon its qualitatively superior integration proposal, Benns asserts that issues are warranted to explore the impact of the unreported change of residence on Heidelberg-Stone's basic and comparative qualifications.

8. Benns submits declarations from three private investigators hired in early 1993 to locate Stone, as well as documentation, in the form of tax assessments and a marriage license, officially listing Stone as a Hamburg resident. Two of the investigators, Mssrs. Hobbs and Hamar, aver that they learned that Stone left the Cottonwood residence a year or two ago and moved to Arkansas, that she has returned only for brief visits, and that the property has been for sale since her departure. Hobbs was advised by the Post Office that a year or so ago Stone had submitted, but later withdrew, a change of address. Attached to Hamar's statement is a real estate Multiple Listing, dated January 20, 1993, showing that the Cottonwood property is for sale.

9. A third investigator, Mr. Sligh, discovered Stone's Hamburg address and unpublished telephone number; he also learned of her marriage on January 28, 1993 to a local Hamburg resident. A copy of the marriage license and a warranty deed, reflecting that, as of January 1993, Stone owns the Hamburg residence, is attached to Sligh's declaration. Also attached are personal property tax records showing the registration of Stone's vehicle in Arkansas. Although Benns asserts that the move took place as much as a year ago, it claims to have exercised due diligence in bringing this matter to the Commission's attention, inasmuch as it only recently obtained documentation officially showing Stone's changed residence. It notes that, while Stone had a Hamburg telephone number, she had no Cottonwood number, which made it difficult to find her.

10. Turning to the merits, Benns concedes that it cannot establish the precise timing of the move or Stone's intention without a hearing. But it claims to have presented prima facie evidence that the move is permanent and that it was deliberately concealed from the Commission. Benns contends that such evidence raises a substantial and material question warranting further inquiry under *Weyburn Broadcasting Limited Partnership,* Case Nos. 91-1383 (D.C. Cir. Feb. 12, 1993). In particular, Benns cites Stone's January 28, 1993 marriage to a local Hamburg resident, her recent acquisition of her Hamburg home, the listing for sale of her Cottonwood home, and the withdrawn change of address to establish that Heidelberg-Stone intentionally concealed Stone's permanent change of residence. On this basis Benns attempts to distinguish *Leininger-Geddes Partnership,* 2 FCC Rcd 3199 (Rev. Bd. 1987), in which the Board refused to add an issue for failing to report a temporary move, where the integrated owner reaffirmed a pledge to reside full-time in the proposed community of license.

11. *Opposition:* Heidelberg-Stone urges that Benns' motion is untimely and does not raise a substantial and material question warranting further inquiry. It submits a declaration under penalty of perjury from Katharine Stone stating that she has maintained her legal and permanent residence in the service area at all times since the close of the record. While Stone does not recall submitting a change of address, she acknowledges maintaining a second residence in Hamburg since the fall of 1991, which was deeded to her by her father in anticipation of her January 28, 1993 marriage. Nonetheless, she has reaffirmed her pledge to be integrated and to reside full-time in the service area. Given this pledge, Heidelberg-Stone urges that, even if true, a change of residence after the close of the record is not decisionally significant since none of the applicants may receive comparative credit for post-record changes.

12. *Reply:* In reply, Benns submits a declaration from A. Susan Miller, a private investigator hired by Benns to determine whether Katherine Stone ever filed a change of address to have her mail forwarded from her Cottonwood residence to an address in Hamburg. Through associates Miller learned that, according to records at the Cottonwood post office, Stone submitted a change of address in June 1991 directing that her mail should be forwarded to Hamburg, and that that change of address was withdrawn in May 1992. Benns also submits a further declaration from Sligh confirming that Stone does receive mail at her Hamburg home.

13. *Discussion:* We have examined Benns' allegations according to the standards governing motions to reopen the record and enlarge issues. To warrant further hearings following the close of the record the party seeking the issue must show: (1) that it relies on new or newly discovered evidence that could not, through the exercise of due diligence, have been discovered earlier; (2) that the evidence, if proven, would raise a substantial and material question of fact affecting the ultimate outcome of the proceeding; and (3) that there is a substantial likelihood of proving its potentially dispositive allegations if the case is remanded for further hearings. Benns' motion to reopen and enlarge issues fails all three standards and must be denied.

14. First, to the extent that Benns purports to rely on newly discovered evidence, Stone's statement reflects that the alleged move to Hamburg occurred in the Fall of 1991. Benns claims to have had trouble finding Stone because she is a recluse without a phone number in Cottonwood. Yet, Stone's whereabouts were readily discovered by the investigators that Benns hired in January and February of 1993 (i.e., after the release of an unfavorable Review Board Decision on December 31, 1992). In this regard, an applicant has an obligation to present its arguments as early as possible; it may not rest on its rights in the hope that the passage of time will improve its position. See *Colorado Radio Corp. v. FCC,* 118 F.2d 24, 27 (D.C. Cir. 1941). Benns' clear lack of due diligence warrants the denial of its motion, particularly given the unexplained delay in investigating this matter. See *Leininger-Geddes,* 2 FCC Rcd at 3200 ¶ 8.

15. Second, even if Benns' motion were deemed to be timely (because affirmative evidence documenting Stone's residence in Hamburg was not previously discoverable),

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(1992), appeal pending sub nom. *Evergreen Broadcasting Corporation II v. FCC,* No. 91-1511 (filed 10-18-91); *Omaha TV 15, Inc.,* 4 FCC Rcd 730, 730 ¶ 5 (1988).

Benns has not shown that the move, if proven, raises a substantial and material question of fact affecting the outcome of this proceeding, let alone shown a substantial likelihood of proving that Stone has permanently left the service area and that this change affects Heidelberg-Stone's basic or comparative qualifications. A section 1.65 issue is not warranted unless the unreported information is decisionally significant or there is a *prima facie* showing of intentional concealment or a pattern of violations. *Merrimack Valley Broadcasting*, 99 FCC 2d 680, 683 n.9 (1984). On the one hand, while the grant to Heidelberg-Stone turned on its superior integration proposal, its comparative position was only marginally enhanced by Mrs. Stone's *short-term* service area residence, and, as noted in paragraph 5 above, it was inferior to second-ranked GBC on this factor. On the other hand, Heidelberg-Stone cannot prevail comparatively if its 49% owner has, by moving 375 miles from Goodlettsville, abandoned her full-time integration proposal, and intentional concealment could warrant its disqualification.

16. As in *Leininger-Geddes*, 2 FCC Rcd at 3200 ¶ 9, Stone's move from the service area is not decisionally significant because she has unequivocally reaffirmed her integration commitment, as well as her intent to reside full-time in the service area if the application is granted, and because she has satisfactorily explained the circumstances surrounding her residence in Hamburg, thereby rebutting Benns' inferences that she never intended to live in the service area or that her change of residence was permanent and that this change was intentionally concealed.[12] She states under penalty of perjury that she has maintained her service area residence since the close of the record, and that she has continued to spend significant amounts of time in Tennessee. She has a Tennessee driver's license, pays income tax, and votes in Tennessee. Contrary to Benns' claim, she has not rented the house: Since July 1992 it has been occupied by friends, who tend the house in her absence, permit Stone access to it when she is in Tennessee, and pay a very small amount for living in the house. All of the utilities, except the phone, are in Stone's name. She did, however, list the Cottonwood house for sale in April 1991 with the intention of moving to Goodlettsville or to another community in the service area.

17. As to the alleged move to Hamburg, Stone avers that she went to Hamburg in the Fall of 1991 to assist her parents during her mother's convalescence from an accident, and that she remained there part-time because of her childrens' successful enrollment in school. Not only has Benns presented no evidence impeaching her renewed pledge to reside full-time in the service area if her application is granted, the unexpected nature of Stone's move to Hamburg also belies Benns' suggestion that, contrary to the representation that Stone is a service area resident, she intended all along to return to her hometown of Hamburg. And, despite the fact that Stone does not have a phone listing in Cottonwood, it does not appear that there was an intent to conceal Stone's second residence in Hamburg, given the circumstances set out above and the ease with which the second residence was discovered by Benns' investigators. Even if we accept Benns' undocumented claim that Stone submitted a change of address in June 1991, and withdrew it in May 1992, Benns has not raised a substantial and material question concerning intentional concealment.

18. Nor is there a substantial and material question that, given her recent marriage to a Hamburg resident and acquisition of her Hamburg house, Stone has abandoned her integration pledge. Stone explains that her father deeded the Hamburg property to her because of her impending marriage. Stone has denied under penalty of perjury that either circumstance will interfere with her integration commitment. Benns contends that, even if Stone does return to the service area full-time, her ownership of a home in Hamburg will give her an incentive to return there as soon as possible. This, however, is unsupported speculation, as is the claim that Stone rented the Cottonwood property to friends who would forward her mail in order to conceal her change of address. Benns -- which has the burden of demonstrating that there is a substantial and material question likely to affect the outcome of the proceeding -- has not presented any probative evidence undermining her full-time integration commitment. Nor has it cited a single case to support its further contention that a change in Stone's residence and marital status must be deemed to constitute an abandonment of her integration proposal. In the face of Stone's sworn statement to the contrary, Benns' conjecture about her plans does not warrant further inquiry concerning Heidelberg-Stone's basic or comparative qualifications. Thus, in addition to Benns' clear lack of diligence, its allegations concerning Stone's area residence do not raise a substantial and material question that would affect the outcome of this proceeding. Its motion is therefore denied.

ORDERS

19. ACCORDINGLY, IT IS ORDERED That the request for permission to file application for review in excess of ten pages or, in the alternative, for permission to file an amended application for review, filed March 8, 1993, by Tennessee Women In Broadcasting IS GRANTED;[13] that the amended application for review, submitted for filing on March 8, 1993, by Tennessee Women In Broadcasting IS ACCEPTED; that the the Motion to Strike, filed February

[12] We disagree, however, that Heidelberg-Stone had no duty under section 1.65 to report Stone's Hamburg residence. It argues that this information was not reportable under section 1.65, inasmuch as no applicant received any comparative credit for residence after the close of the hearing record. Nonetheless, Heidelberg-Stone was credited for Stone's *full-time* residence in the service area. That Stone was no longer a full-time service area resident after August 1991, when she established a second residence in Hamburg should have been reported under section 1.65. But this technical section 1.65 violation does not warrant further inquiry because, as reflected below, Benns has not demonstrated that the unreported information was decisionally significant or that it was deliberately concealed.

[13] As Heidelberg-Stone notes, the Commission does not routinely grant requests for permission to file pleadings in excess of the prescribed page limitations, 47 C.F.R. § 1.48(b), and such requests are to be submitted prior to the filing deadline. Nonetheless, TWIB's amended application for review complies fully with the ten-page limit for applications for review. Under these circumstances, we are not persuaded that TWIB's failure to submit its request to file an application for review in excess of ten pages either prior to, or contemporaneously with, its 17 page application for review is a basis for rejecting its amended application for review.

16, 1993, by Heidelberg-Stone IS DISMISSED as moot; and that the motion to dismiss, filed March 16, 1992, by Heidelberg-Stone Broadcasting Company IS DENIED.

20. IT IS FURTHER ORDERED, That, pursuant to 47 C.F.R. § 1.115(g) of the rules, the applications for review, filed on January 21, 1993 by William E. Benns; filed on January 29, 1993 by Bledsoe Communications Ltd.;[14] filed on February 1, 1993 by Richard S. Frances, filed on January 29, 1993 by SAR Bradcasting, Inc., filed on February 1, 1993 by Tennessee Women in Broadcasting, filed on February 1, 1993 by Goodlettsville Broadcasting Company, and filed on February 1, 1993 by Goodlettsville Community Broadcasting Company ARE DENIED.

21. IT IS FURTHER ORDERED That the motion to reopen the record and enlarge the issues against Heidelberg-Stone Broadcasting Company, filed March 1, 1993, by William E. Benns IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[14] In affirming the award of only 75% credit for the proposed integration of Bledsoe's sole general partner, we note that Bledsoe filed its application after *Ownership Attribution (Clarification)*, 1 FCC Rcd 802, 804 (1986) and after *Daytona Broadcasting Co.*, 103 FCC 2d 931 (1986). It therefore had specific notice of the Commission's pronouncements therein concerning the attribution for integration purposes of the provision of legal services by nominally passive owners. In this regard, we place no reliance on the Board's citation (7 FCC Rcd at 60 ¶ 14) of language from the court's unpublished opinion in *Maricopa Media, Inc. v. FCC*, 951 F.2d 1324 (D.C. Cir. 1991) (Table).

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
July 21, 1993

Released: July 28, 1993

Edward D. Young, III, Esq. W-P-C 6838
Vice President, General Counsel W-P-C 6840
and Secretary
New Jersey Bell Telephone Company
540 Broad Street - 20th Floor
Newark, New Jersey 07101

Dear Mr. Young:

This letter is in reference to the applications for Section 214 authority to provide video dialtone service in Florham Park (W-P-C 6838) and Dover Township (W-P-C 6840), New Jersey. These applications represent the first filings for the provision of a tariffed, video dialtone service on a non-experimental basis.

The applications, as originally filed, stated that 1) New Jersey Bell (NJB) "will provide 64 channels of video dial tone capacity during initial stages of construction and testing, and the capability will exist to provide several hundred channels of capacity to meet demand within 36 months after construction commences" (NJB Applications at 6); 2) the "initial programmer-customer will use 60 channels of video dial tone capacity" (NJB Applications at 2); and 3) "New Jersey Bell will directly assign to its video dial tone service the incremental investments and expenses that it incurs to provide this service (NJB Applications at 9)."

In response to comments filed and questions posed by the Commission's staff, NJB, on April 30, 1993, modified its video dialtone proposals. NJB now states that it will have the "capacity for at least 384 channels by June 1994 to allow for installation by September 1994" (NJB Answers at 4). In terms of cost allocation, NJB states that "video dialtone will be assigned all direct costs, including a fair portion of shared costs for all common facilities and overhead, including fiber, and overhead" (NJB Answers at 8).

The modifications made by NJB in its Answers are significant; however, NJB has not amended its applications to reflect these modifications. We are concerned about preserving the integrity of the Section 214 process for permanent authorizations, particularly for the initial filings for authority to provide video dialtone service. We stated in the *Video Dialtone Order* that we will not "streamline or eliminate as unnecessary the present Section 214 certification requirement" because "the Section 214 process plays an important role in our ability to ensure that the risk of anticompetitive conduct is minimized." *Video Dialtone Order*, 7 FCC Rcd at 5827, n.231. Furthermore, we stated in the *New York Telephone* video dialtone order that "the Commission expects a greater level of specificity in applications for actual service offerings, as opposed to trials." *New York Telephone*, FCC 93-302 (released June 29, 1993). NJB's applications, as they now stand, do not contain the level of specificity necessary to make the determination that the public convenience and necessity will be served by the proposed service offerings. Therefore, we will provide NJB the option of filing amended applications for Florham Park and Dover Township that contain that necessary level of specificity.

If NJB elects to file amended applications, it should address two areas in particular. First, it still appears that NJB intends to give priority access to one programmer-customer on each video dialtone system before a reasonable amount of capacity is available to other programmers. We stated in the *Video Dialtone Order* that the construction and operation of the basic common carrier platform will serve as the foundation through which a multiplicity of programmers can provide to consumers services that will advance our goals of infrastructure development, increased competition in the delivery of video services, and the fostering of a diversity of video services to promote consumer choice. *Video Dialtone Order*, 7 FCC Rcd at 5797. While we did not impose a minimum capacity requirement, we did state that as a general principle, the platform must have the ability to provide capacity to multiple video programmers and to expand as demand increases so as not to become a bottleneck that will thwart realization of our public interest goals. *Id.*

NJB's applications, as initially filed, appear to be inconsistent with the video dialtone requirement of a basic common carrier platform through which a multiplicity of programmers can provide video services to consumers. Although NJB subsequently clarified its proposals to reflect the provision of a basic platform with 384 channels of capacity, this capacity will not be available until September 1994. Given the lack of experience with the proposed technology, there remain significant issues concerning NJB's ability to implement this additional capacity within its proposed timeframe. NJB's pioneering efforts are promising; however, the lack of sufficient capacity to adequately serve more than the initial programmer-customer on each video dialtone system through existing technology does not appear to be consistent with our video dialtone policies.

In addition, the method by which NJB proposes to account for the costs of providing video dialtone service requires clarification. For example, if NJB intends to assign to the video dialtone service all direct costs, including a fair portion of shared costs for all common facilities and overhead, using a general allocator, as stated in its filing of April 30, 1993, then the general allocator and the costs assigned to video dialtone should be identified. Furthermore, NJB has not identified the quantities and cost of major materials, or the associated amount of labor and cost thereof. *See* 47 C.F.R. Section 63.01(k)(1). In addition, NJB has not provided the necessary level of detail concerning its use of Sammons' coaxial drops. For example, if NJB is not leasing these facilities, it must provide a detailed description of the facilities involved; the terms of the contract or other arrangement relating to the use of such facilities; added equipment costs; and other costs associated with the use of the facilities. *See* 47 C.F.R. Section 63.01(k)(4).

We believe NJB has taken a significant step toward making video dialtone service a reality for its subscribers. Particularly in these developmental stages, we recognize that changes are to be expected. However, as these applications now stand, they do not contain the level of specificity necessary for the Commission to make the determination that the public convenience and necessity will be served by the proposed service offerings. We believe that the video dialtone systems proposed by NJB for Florham Park and

Dover Township hold sufficient promise to justify the filing of an amended application or a new application. Consequently, before taking any action on the applications as they now stand, we will provide New Jersey Bell 45 days from the date of this letter to file an amended application or new application responsive to our concerns. If NJB elects to file amended applications, we will allow interested parties 15 days from the date of public notice to file comments.

This letter was adopted by the Commission on July 21, 1993.

BY DIRECTION OF THE COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

DENNIS ELAM, CHAPTER
SEVEN TRUSTEE FOR BAKCOR
COMMUNICATIONS, INC. AND
BAKKE COMMUNICATIONS, INC.
Assignor

and File Nos. BAL-930125EI;
BALH-930125EJ

RAMAR DEVELOPMENT, INC.
Assignee

For Assignment of Licenses
of KXTQ(AM)/KKIK-FM
Lubbock, Texas

MEMORANDUM OPINION AND ORDER

Adopted: July 23, 1993; Released: July 23, 1993

By the Commission:

1. The Commission has before it for consideration the above-captioned applications for consent to assign the licenses of KXTQ(AM)/KKIK-FM, Lubbock, Texas from Dennis Elam, Trustee for Bakcor Communications, Inc. and Bakke Communications, Inc., to Ramar Development, Inc. ("Ramar"). The principals of Ramar, the proposed assignee, also control Ramar Communications, Inc., the licensee of UHF television station KJTV(TV), Channel 34, Lubbock, Texas, an affiliate of Fox Broadcasting Company. Because the Grade A contour of KJTV(TV) encompasses the entire community of Lubbock, Texas, a grant of the assignment application would result in Ramar owning attributable interests in a television station and an AM and FM radio station in the same market in violation of 47 C.F.R. § 73.3555(c), the Commission's one-to-a-market rule.[1] Ramar requests a waiver of the rule in connection with the proposed assignment. Donald R. Workman ("Workman"), a listener and resident of the service area of KXTQ(AM)/KKIK-FM, filed a petition to deny the assignment application on March 4, 1993. Workman was an unsuccessful bidder for the stations in the bankruptcy proceeding and opposes Ramar's request for a waiver of the one-to-a market rule. Workman also contends that Ramar lacks the character qualifications to be a Commission licensee.

2. In support of its waiver request, Ramar relies on the Commission's decision generally to permit television-radio combinations which meet the "failed station" standard set forth in *Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules* ("Second Report and Order"), 4 FCC Rcd 1741 (1989), *recon. denied in part and granted in part*, 4 FCC Rcd 6489 (1989).[2] Specifically, Ramar states that KXTQ(AM)/KKIK-FM are presently being operated by Mr. Elam as Chapter 7 Bankruptcy Trustee under the auspices of the United States Bankruptcy Court and have been in bankruptcy proceedings since 1989.

3. In his petition to deny, Workman asserts that the proposed transaction does not qualify for treatment under the "failed station" standard. In this regard, Workman argues that the bankruptcy proceeding standing alone is an insufficient basis on which to grant a rule waiver permitting a television licensee to acquire a Class C FM station. Workman argues that the policy behind waiver of the one-to-a-market rule has historically been to promote the activation or continued operation of UHF television stations, and thus, a waiver may be granted without further inquiry based on the bankruptcy of a UHF television station in order to allow the acquisition of that station by a radio licensee. However, Workman further argues that when the principals of a financially sound television station seek to acquire an AM/FM combination, a waiver under the failed station standard cannot be granted unless the applicant demonstrates that the request will further the policy behind allowing waiver of the one-to-a-market rule.

4. In the *Second Report and Order*, the Commission set forth standards for reviewing requests for waivers of the "one-to-a-market" rule. Specifically, the Commission determined that it would look favorably on waiver requests which: (1) involve radio and television station combinations in the top 25 markets where there are at least 30 separately owned, operated and controlled broadcast licensees or "voices" after the proposed combination; or (2) involve a "failed" radio or television station that has not been operated for a substantial period of time (*e.g.*, four months); or is involved in a voluntary or involuntary bankruptcy proceeding. *See Second Report and Order*, 4 FCC Rcd at 1741. The Commission stated that it would consider other requests for waiver of the one-to-a-market rule on a more rigorous case-by-case basis. With regard to the "failed station" standard, the Commission found that the objectives of diversity and competition are better served by preserving the service provided by the "failed station," even if that involves joint ownership of that station and another local station. *Id.* at 1753. However, in either situation, an applicant requesting waiver of the rule is first required to provide relevant documentation, *i.e.*, proof of

[1] Section 73.3555(c) of the Commission's Rules prohibits the common ownership of radio and television stations in the same market if the 2 mV/m contour of an AM station or the 1 mV/m contour of an FM station encompasses the entire community of license of a television station or if the Grade A contour of a television station encompasses the entire community of license of an AM or FM station. The substance of the one-to-a-market rule was not amended in the Commission's recent revision of the local and national ownership rules. *See Revision of Radio Rules and Policies*, 7 FCC Rcd 2755 (1992); *reconsideration granted in part*, 7 FCC Rcd 6387 (1992).

[2] The "failed station" standard is set forth in Note 7 to the one-to-a-market rule. *See* 47 C.F.R. Sec. 73.3555 n.7.

the length of time that the station has been off the air, or proof that the station is involved in bankruptcy proceedings.

5. The staff previously approved a *pro forma* involuntary assignment of the licenses of KXTQ(AM)/KKIK-FM from Bakcor Broadcasting, Inc. and Bakke Broadcasting, Inc., Debtor-in-Possession, to Dennis Elam, Trustee.[3] This transaction was supported by a court order indicating that Mr. Elam had been appointed trustee for the purpose of operating the stations and proceeding with the liquidation of the bankruptcy estate. Moreover, the application at issue here was amended on March 18, 1993 to include a copy of the bankruptcy court's further order approving the asset purchase agreement providing for the sale of the stations to Ramar. Consequently, Ramar has presented evidence that demonstrates that this transaction meets the "failed station" standard. *See, e.g., KEZB, Inc.*, 7 FCC Rcd 3209 (1992).

6. In this regard, we reject Workman's argument that the "failed station" standard was primarily intended to allow radio licensees to acquire UHF television stations. The *Second Report and Order* adopted a policy for evaluating waivers of the radio-television cross-ownership prohibitions under circumstances other than just those that involved UHF television stations. The "failed station" waiver standard replaced the radio-UHF exception in Note 4 of Section 73.3555 by which the Commission had allowed certain radio-UHF television combinations on a case-by-case basis, in order to foster the development of UHF television. *See* 4 FCC Rcd at 6490 n.2. This exception was a mechanism for applying, not waiving, the provisions of the one-to-a-market rule. *See* 47 C.F.R. § 73.3555 Note 4 (1986); *WOIO*, 1 FCC Rcd 293, 294 (1986)(By Direction Letter). In the *Second Report and Order*, the Commission noted that the "failed station" standard is more conservative than the Note 4 exception to the radio-TV cross-ownership rule because a presumptive rule waiver will be allowed only in two specific instances, *e.g.*, bankruptcy and cessation of operation for a substantial period of time. *See* 4 FCC Rcd at 1752. Contrary to Workman's assertion, the Commission did not articulate different standards for waiver requests based on whether the failed station was a television or radio station.[4] *See Radio Management Services, Receiver*, 7 FCC Rcd 2959, 2961 (1992). Therefore, we reject Workman's assertion that Ramar is required to provide further documentation or public interest justifications for a waiver under the "failed station" standard.

7. Ramar has provided documentation sufficient to demonstrate that a waiver of the one-to-a-market rule is warranted under the "failed station" standard. However, as Workman points out, the Commission specifically stated that "petitioners who submit petitions to deny might be able to rebut the |"failed station"| waiver request." *See Second Report and Order*, 4 FCC Rcd at 1752. In this regard, Workman asserts that a waiver of the one-to-a-market rule in this case will not further the policy of the "failed station" standard because the stations at issue are financially stable and only subject to the jurisdiction of the bankruptcy court by virtue of the bankruptcy of the corporate licensee, which owns a group of stations. Workman also asserts that other potential licensees bid on the stations in the bankruptcy proceeding, and therefore, the licenses may be assigned to another qualified individual or entity which will assure continuity of service without the necessity for a rule waiver.

8. We find that Workman's assertions are insufficient to demonstrate that grant of the requested waiver is inconsistent with the public interest, and thereby rebut Ramar's presumptive entitlement to a waiver. *See, e.g., Com III TV, Inc.*, 7 FCC Rcd 3613, 3615 (1992). We note that the bankruptcy court has appointed Mr. Elam as the trustee of the assets of the corporate licensee's bankruptcy estate in order to liquidate these assets for the benefit of creditors. The assets of the bankruptcy estate include the assets of KXTQ(AM) and KKIK-FM. Workman's claims that the bankruptcy might be the result of the group owner's financial problems in another market, mismanagement or overleveraging that does not affect the stations to be assigned here are interposed only hypothetically, and are completely unsubstantiated. Similarly, Workman offers no evidence to support his assertion that KXTQ(AM)/KKIK-FM are financially viable and therefore likely to remain on the air even if no waiver is granted. Furthermore, Workman presents no evidence of manipulation or bad faith associated with the bankruptcy proceeding. Thus, there is no basis to go behind the court proceeding and seek further evidence concerning the financial condition of the corporate licensee and its individual assets. *See Radio Management Services*, 7 FCC Rcd at 2961 n.15. Additionally, we have specifically rejected the argument that an applicant for a "failed station" waiver must demonstrate that the trustee has been unsuccessful in locating a prospective buyer who has no conflict with the rule. *See Radio Management Services, Receiver*, 7 FCC Rcd at 2961. The presumption is based on the fact that the stations have failed, *e.g.*, are in bankruptcy, and no more is required. *Id.* Consequently, Workman has failed to meet his rebuttal burden.

9. Finally, Workman contends that a civil judgment against Ray Moran, Ramar's vice president and director, calls into question Ramar's character qualifications. Specifically, Workman states that a Texas state court determined that Moran was civilly liable for intentional destruction of broadcast equipment used by KRLB(FM), Lubbock, Texas. Workman was the licensee of KLRB(FM) when these events took place in 1985. Workman argues that Moran's actions are subject to sanction pursuant to 47 U.S.C. § 303(m)(1)(C), which provides for the suspension of an individual operator's license upon proof that the operator has willfully damaged or permitted radio apparatus or installations to be damaged. Workman further contends that Moran, as a Commission licensee, must be held to an even higher standard than an individual holding a Commission operator's license. Therefore, Workman alleges that Moran violated the Communications Act, and that this conduct is relevant under the Commission's Character Policy. *Policy Regarding Character Qualifications in Broadcast Licensing*, 5 FCC Rcd 5232 (1990), *recon. granted in part, denied in part*, 6 FCC Rcd 3448 (1991), *modified in part*, 7 FCC Rcd 6564 (1992)(1990 Character Policy Statement). *See also Character Policy Statement*, 102 FCC 2d 1179 (1986), *recon. granted in part, denied in part*, 1 FCC Rcd 421 (1986), *appeal dismissed*

[3] *See* BAL-910531EI, granted July 11, 1991. We also note that a prior involuntary transfer of control of the licenses, to Bakcor Broadcasting, Inc. and Bakke Broadcasting, Inc., as debtor-in-posesssion, was granted on August 16, 1989. *See* BTC-890714HY.

[4] Workman's contention in this regard constitutes a belated request to alter the standards established for waiver of the one-to-a-market rule in the rulemaking proceeding.

sub nom. National Association for Better Broadcasting v. FCC, No. 86-1179 (D.C. Cir. Jun.11, 1987)(1986 Character Policy Statement).

10. In its opposition, Ramar acknowledges the civil judgment against Moran but states that the judgment is still subject to final appellate review. Furthermore, Ramar argues that Moran's actions do not adversely affect its character qualifications, since the findings in the civil lawsuit do not indicate that Moran violated the Commission's rules or the Communications Act and do not implicate non-FCC misconduct relevant under the Commission's Character Policy. Ramar also contends that the events underlying the civil suit against Moran occurred eight years ago and that Workman had the obligation to bring them to the Commission's attention at the time that these events occurred. In reply, Workman asserts that he could not have brought Moran's conduct to the Commission's attention until the Texas trial court, in its initial ruling on April 11, 1990, made a determination that Moran had destroyed the equipment.

11. Although Ramar asserts that the civil suit is still under appeal, it concedes the accuracy of the underlying facts set forth in the court's opinion. The court found that Moran had leased tower space for KRLB(FM) to Workman. Moran later notified Workman to vacate the tower space. Thereafter, KRLB(FM) began broadcasting from a new site, but Workman failed to remove its antenna and transmitter equipment from Moran's tower by the date specified by Moran. Consequently, Moran and his engineer removed the equipment. In order to do so, the engineer broke down the door of the building in which the equipment was housed, and dismantled the equipment, damaging it in the process. The court agreed that Moran's removal of the equipment in this manner was not justified, because under the terms of the lease, Workman had an additional 30 days from the termination date specified by Moran to remove the equipment. Consequently, a judgment for intentional destruction of personal property was entered against Moran.

12. In the 1986 Character Policy Statement, the Commission indicated that it would concern itself with "misconduct which demonstrates the proclivity of an applicant or licensee to deal truthfully with the Commission and to comply with our rules and policies." 102 FCC 2d at 1190-91. Consequently, in evaluating the character qualifications of an individual or entity, the Commission deems relevant misconduct which violates the Communications Act or a Commission rule or policy, and also considers certain specified non-FCC misconduct. *Id.* The Commission recently revised its character policy, in part to broaden the range of relevant non-FCC misconduct. *See 1990 Character Policy Statement*, 5 FCC Rcd 3252 (1990), *recon. granted in part and denied in part*, 6 FCC Rcd 3448 (1991), *modified in part*, 7 FCC Rcd 6564 (1992). Specifically, the 1990 Character Policy Statement identified the following categories of non-FCC misconduct relevant to an applicant's qualifications: adjudicated (a) fraudulent misrepresentations to governmental units; (b) criminal misconduct involving false statements or dishonesty, (c) violations of antitrust or anticompetitive laws involving any media of mass communications, as defined in 47 U.S.C. § 309(i); and (d) misconduct constituting a felony. Under the revised 1990 Character Policy Statement, misconduct which violates the Communications Act or the Commission's rules continues to be relevant to an applicant's qualifications. 5 FCC Rcd at 3252. However, Workman's assertions concerning Ramar's character qualifications based on actions taken by Moran to remove Workman's broadcast equipment from Moran's property are insufficient to demonstrate that grant of this assignment application is *prima facie* inconsistent with the public interest because the actions cited do not involve relevant FCC misconduct or non-FCC misconduct as set forth in the 1990 Character Policy Statement and Workman has not otherwise demonstrated its relevance. *See Astroline Communications Company*, 857 F.2d at 1556.

13. First, the plain language of Section 303(m)(1) applies to radio operators.[5] The Commission has consistently declined to apply the provisions of Section 303(m)(1) to station licensees, although the Commission has admonished a common carrier licensee for self-help actions which shut down the broadcast transmitter of another common carrier licensee.[6] Moreover, even if Moran's conduct did violate the Act or the Commission's rules, or otherwise presented the requisite *prima facie* showing, we would not find Ramar disqualified under the circumstances presented, nor would we find that the conduct raises a substantial and material question of fact which would require further inquiry. In this case, the conduct occurred eight years ago, and is therefore remote in time.[7] Furthermore, Workman does not allege or present evidence that Moran has repeatedly engaged in similar misconduct. *See generally Virginia RSA 6 Cellular Limited Partnership*, 6 FCC Rcd 405, 407 (1991). Although we do not condone Moran's behavior, under all the circumstances presented, we find that no further inquiry is warranted.[8] Finally, the judgment of the

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[5] Section 303(m)(1) provides that the Commission shall "[h]ave authority to suspend the license of any operator" upon proof sufficient to indicate that the operator has taken certain actions. An operator's license is subject to suspension under subsection (C) upon proof that the operator "[h]as willfully damaged or permitted radio apparatus of installations to be damaged." 47 U.S.C. § 303(m)(1)(C). *See also* 47 C.F.R. § 1.85.

[6] The Commission has specifically held that other provisions of Section 303(m)(1) apply to the conduct of operators and not station licensees. *See American Television and Communications Corp.*, 44 RR 2d 923, 927-28 n.9 (1978). *See generally, The Polite Society, Inc.*, 55 FCC 2d 810, 813 (1975). In this regard, we note that *Didriksen v. Federal Communications Commission*, 254 F.2d 354 (D.C. Cir. 1958), which Workman cites, involved the appeals of the Commission's suspension of radio operators' licenses under the provisions of Section 303(m)(1)(C).

[7] In this regard, we reject Workman's argument that it would have been premature to bring Moran's actions to the Commission's attention prior to an adjudication by the Texas courts. Since Workman is alleging that Moran's actions are FCC related misconduct, the Commission, and not the local courts, is the proper forum in which to decide whether the Communications Act or the Commission's rules have been violated. Ramar Communications, Inc., in which Moran has an attributable interest, has received license renewals for KJTV(TV) and has acquired other stations subsequent to the time of the actions of which Workman complains, but Workman did not bring Moran's actions to the Commission's attention in connection with these proceedings. *See, e.g., Ramar Communications, Inc.*, 7 FCC Rcd 3310 (1992).

[8] The Commission's character policy statements are guidelines only, and the Commission is "free to exercise ... discretion in situations that arise." *See* 5 FCC Rcd at 3252, *citing Guardian Federal Savings & Loan Ass'n v. Federal Savings & Loan Insur-*

Texas state court that Moran is liable to Workman for intentional destruction of personal property does not come within the range of non-FCC misconduct relevant to an applicant's character qualifications and has not otherwise been shown to be relevant, and therefore fails to make the required *prima facie* case. *See 1990 Character Policy Statement*, 5 FCC Rcd at 3252.

14. *Conclusion*. In view of the foregoing, IT IS ORDERED, That, the request for waiver of the Commission's one-to-a-market rule, 47 C.F.R. Sec. 73.3555(c), IS HEREBY GRANTED, and the application for assignment of the licenses of KXTQ(AM)/KKIK-FM, Lubbock, Texas, from Dennis Elam, Trustee for Bakcor Broadcasting, Inc. and Bakke Broadcasting, Inc. to Ramar Development, Inc. ARE HEREBY GRANTED. IT IS FURTHER ORDERED, That, the petition to deny filed March 4, 1993, by Donald R. Workman IS HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

ance Co., 589 F.2d 658, 666 (D.C. Cir. 1978). Therefore, the intentional destruction of broadcast equipment by a broadcast station licensee may, under appropriate circumstances, raise character qualifications issues sufficient to warrant additional investigation.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 93-132

In the Matter of

Kentucky Public Safety Plan

ORDER

Adopted: July 28, 1993; Released: August 3, 1993

By the Chief, Private Radio Bureau and the Chief Engineer:

1. On January 28, 1993, Region 17 (Kentucky) submitted its Public Safety Plan to the Commission for review. The Plan sets forth the guidelines to be followed in allotting spectrum to meet current and future mobile communications requirements of the public safety and special emergency entities operating in Kentucky.

2. The Kentucky Plan was placed on Public Notice for comments due on June 14, 1993, 58 FR 28018 (May 12, 1993). The Commission received no comments in this proceeding.

3. We have reviewed the Plan submitted for Kentucky and find that it conforms with the National Public Safety Plan. The plan includes all the necessary elements specified in the *Report and Order* in Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987), and satisfactorily provides for the current and projected mobile communications requirements of the public safety and special emergency entities in Kentucky.

4. Therefore, we accept the Kentucky Public Safety Radio Plan. Furthermore, licensing of the 821-824/866-869 MHz band in Kentucky may commence immediately.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the
Applications

For Authority to Construct
and Operate Multichannel Multipoint
Distribution Service stations on the
E and F-group channels for

	File Nos.
Multichannel Distribution of America Prescott, Arizona	672-CM-P-83
Haddonfield Wireless Company Lubbock, Texas	5306-CM-P-83
HDH Telecommunications, Inc. Charleston, West Virginia	5407-CM-P-83
John Mester dba Mester's TV Poughkeepsie, New York	8466-CM-83
J. Hobart Wilson Idaho Falls, Idaho	16159-CM-P-83
J. Hobart Wilson Lansing, Michigan	16166-CM-P-83

ORDER AND NOTICE OF APPARENT LIABILITY

Adopted: July 28, 1993; Released: August 3, 1993

By the Chief, Domestic Facilities Division:

1. *Introduction.* Before the Division are the above-referenced applications to construct and operate Multichannel Multipoint Distribution Service (MMDS) stations on the E and F-group channels. As the result of Commission lotteries held on February 26, 1993, these applications were selected for qualification review. Petitions to Deny have been filed, challenging these applications.[1] Each Petition alleges that each applicant filed a false preference certification. Haddonfield Wireless Company (Haddonfield) filed a reply. For the reasons discussed below, we grant the petitions to deny and issue a Notice of Apparent Liability for forfeiture in the amount of $3000 for each applicant's failure to provide the necessary and accurate information in connection with their preference certifications in violation of Sections 1.65, 1.1622, 1.824(b) and 21.13(a)(5) of the Commission's Rules.

2. *Petitions to Deny.* On January 15, 1993, the Commission released Lottery Notice, Report No. MMDSL-47, which listed the MMDS applications to be included in the February 26, 1993 lotteries. This list also identified the service area, channel group, and preference group, if appropriate, for each MMDS application.[2] Petitioners allege that each applicant filed an incorrect certification of preference, (FCC Form 346), certifying the applicant's mass media holdings, pursuant to rule Sections 1.1621, 1.1622, and 1.1623.[3] Petitioners claim that the above-referenced applicants have more mass media holdings and therefore were not eligible for the preferences indicated in the January 15, 1993 Lottery Notice.[4] Petitioners contend that as the result of these false certifications, each applicant benefitted from a lottery preference it did not deserve. Therefore, Petitioners request that the above-referenced applications be dismissed.

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[1] We note that Multi-Micro, Inc. filed a request to withdraw its Petition to Deny against the applications of J. Hobart Wilson for the F-group channels at Idaho Falls, Idaho and Lansing, Michigan. Because of the serious nature of the allegations raised, we deny Multi-Micro's request. The issues raised by Multi-Micro are similar to those raised by the other petitioners and are addressed herein.

[2] In conducting a lottery, Section 309(i) of the Communications Act of 1934, 47 U.S.C. § 309(1) requires that minority and diversity preferences be awarded to eligible applicants to encourage diversity in the ownership of mass communications. An applicant awarded a preference(s) will have a greater probability of winning the lottery than an applicant lacking them. Preferences are computed by the Commission, in the manner described in Section 1.1623.

[3] Pursuant to Sections 1.1621, 1.1622, and 1.1623, preferences may be awarded as follows:

Group A - Full Diversity, where the applicant certifies that it and/or its owners have no interest in any media of mass communications. Also, the applicant certifies it and/or its owners are members of a Minority Group.

Group B - Full Diversity, where the applicant certifies that it and/or its owners have no interest in any media of mass communications.

Group C - Partial Diversity, where the applicant certifies that it and/or its owners have no interest in more than three mass communications media facilities. Also, the applicant certifies that it and/or its owners are members of a Minority Group.

Group D - Partial Diversity, where the applicant certifies that it and/or its owners have no interest in more than three mass communications media facilities.

Group E - No Diversity but Minority Group, where the applicant certifies that it and/or its owners are members of a Minority Group.

Group F - No Diversity and no Minority Group.

[4] An "A" preference was listed in the January 15, 1993 Lottery Notice for Haddonfield Wireless (File No. 5306-CM-P-83). A "B" preference was listed for the following MMDS applications: HDH Telecommunications, Inc. (File No. 5407-CM-P-83), John Mester dba Mester's TV (File No. 8466-CM-P-83), J. Hobart Wilson (File No. 16159-CM-P-83) and J. Hobart Wilson (File No. 16166-CM-P-83). A "D" preference was listed for Multichannel Distribution of America (File No. 672-CM-P-83).

3. *Reply.* In reply, Haddonfield acknowledges that it is the licensee for WHT783 in Spokane, Washington and WHT584 in Bakersfield, California, and admits that the preference listed in the January 15, 1993 Lottery Notice was incorrect. Further, it argues that it did not benefit from the incorrect preference because the lottery number selected, 3665, would still have been within the range of numbers assigned to Haddonfield if its preference had been correct. Therefore, Haddonfield contends that the incorrect preference had no effect on its ultimate selection in the Commission lottery.

4. *Discussion.* Section 309 (i)(3)(A) of the Communications Act, 47 U.S.C. § 309(i)(3)(A), requires that:

> The Commission shall establish rules and procedures to ensure that, in the administration of any system of random selection under this subsection used for granting licenses or construction permits for any media of mass communications, significant preferences will be granted to applicants or groups of applicants, the grant to which of the license or permit would increase the diversification of ownership of the media of mass communications...

See also, Amendment of the Commission's Rules to Allow the Selection from Among Certain Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearing, 93 FCC 2d 952 (1983)(hereinafter cited as *Lottery Order).* In the *Lottery Order*, the Commission established rules to be used to award preferences in lotteries for media of mass communications. Among the rules adopted in the *Lottery Order* was the requirement that an applicant inform the Commission of changes in its preference status before commencement of a lottery. Applicants remain under a continuing obligation to make certain that the information on file is correct. *Lottery Order*, 93 FCC 2d at 973; *see also MMDS Lottery Order*, 57 Rad. Reg. 2d 943, 949-950, 954-55 (1984)("As noted in the Lottery Order, improper preference claims are a violation of Federal Law, 18 U.S.C. Sec. 1001; *see Lottery Order*, 93 FCC 2d at 967." *Id.* at 955.)

5. In addition, the Lottery Notice specifically stated that all applicants were required to notify the Commission of any error in content on or before January 29, 1993. A review of Commission records reveals that each applicant had more mass media holdings than represented on their previously-filed preference certification forms.[5] Therefore, each applicant had a duty to file a correct certification of preference form prior to the lottery, but none did so.

6. Haddonfield's claim that it did not benefit from an incorrect preference is erroneous. If Haddonfield's preference group had been corrected to "E" from "A", assignment of an "E" preference would have altered the selection probability of *each* applicant in the lottery, as well as changed the interval assigned to each applicant's preference group. *See* Section 1.1623. With an "A" preference there was an increased probability that a number within Haddonfield's range would be chosen. Conversely, with an "E" preference, the probability that a number would be selected within Haddonfield's range is diminished. Therefore, Haddonfield has not presented a persuasive argument.[6]

7. Based on the foregoing, we find that each applicant benefitted from a lottery preference they did not deserve, and conversely the other applicants in the lottery were harmed because their chances to win the lottery were diminished. Consequently, grant of each above-referenced application would not serve the public interest.

8. *Notice of Apparent Liability.* As each applicant filed a false preference certification in violation of Sections 1.65(a), 1.1622, 1.824(b) and 21.13(a)(5) of the Commission's Rules[7] and in violation of the *Lottery Order*, 93 FCC 2d at 973, and the *MMDS Lottery Order*, 57 Rad. Reg. at 955, we find that monetary sanctions are appropriate. Accordingly, we hereby issue a Notice of Apparent Liability for forfeiture in the amount of $3000.

9. The filing of a false preference certification constitutes a willful violation, as the term "willful" is defined in Section 503(b)(1) of the Communications Act in that each applicant took the action involved, filing a false certification or failing to file a preference correction. The applicants' violations occurred within the last year. *See* Section 503(b)(6)(B). Imposition of a forfeiture is therefore authorized under Section 503(b)(1)[8] and Section 1.80. The Commission established guidelines to be used in assessing forfeitures for violations of the Act. *Standard for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. pending (Standards). Standards* established $30,000 as the base Section 503 forfeiture amount for a common carriers' failure to file required information with the Commission. However, we believe that a downward adjustment is justified here. As each application will be dismissed, we believe that imposition of the maximum monetary penalty as a further sanction is not warranted in light of the nature of the

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[5] For example, at the time the Lottery Notice was released, each applicant had the following mass media holdings. A "D" preference was listed for Multichannel Distribution of America (File No. 672-CM-P-83), indicating that it holds not more than three media of mass communications. Our records reveal that Multichannel holds authorizations for more than four MDS facilities. Likewise, while an "A" preference was listed for Haddonfield Wireless Company (File No. 5306-CM-P-83), indicating that the applicant holds no media of mass communication, our records show that Haddonfield holds authorizations at least two MDS facilities. In addition, a "B" preference was listed for HDH Telecommunications, Inc. (File No. 5407-CM-P-83), indicating that HDH has no mass communications holdings. However, our records reveal that at the time the lottery was conducted, HDH held an authorization for an MDS facility. HDH's license at Buffalo, New York was forfeited on March 31, 1993. In addition, a "B" preference was listed for John Mester dba Mester's TV (File No. 8466-CM-P-83), but our records show that Mester holds authorizations for three MDS facilities. Finally, the "B" preference listed for J. Hobart Wilson (File Nos. 16159-CM-P-83 and 16166-CM-P-83) was incorrect because our records show that Wilson holds authorizations for two MDS facilities.

[6] On May 12, 1993, Haddonfield filed an additional pleading to support its claim that it did not benefit from an incorrect preference. However, we are still not persuaded by the arguments presented.

[7] Section 1.65 specifies that each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application or in Commission proceedings involving a pending application.

[8] Section 503(b)(1)(B) of the Communications Act provides that "any person who is determined by the Commission to have willfully or repeatedly failed to comply with any of the provision of this Act or any rule regulation, or order issued by the Commission... shall be liable to the United States for a forfeiture penalty." 47 U.S.C. § 503(b)(1)(B).

applicants' actions and their degree of culpability. Therefore, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission's Rules, we determine that a forfeiture in the amount of $3000 is appropriate for each applicant's failure to file required corrected preference information.

10. *Conclusion and Ordering Clause.* Having carefully considered all of the pleadings and the evidence submitted, we find that each applicant filed a false preference certification in violation of Commission rules. Accordingly, IT IS ORDERED that the Petitions to Deny ARE GRANTED and that the above-referenced MMDS applications ARE DISMISSED.

11. IT IS FURTHER ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, 47 U.S.C. § 503(b), and Section 1.80, that the above-referenced applicants ARE APPARENTLY LIABLE FOR FORFEITURE in the amount of $3000, for failure to file required information in violation of Sections 1.65(a), 1.1622, 1.824(b) and 21.13(a)(5) of the Commission's Rules and the *Lottery Order, supra*, and the *MMDS Lottery Order, supra*.

12. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. § 1.80(f)(3), that each applicant may, within 30 days of this notice, pay the full amount of forfeiture in the manner provided for in Section 1.80(h) of the Commission's Rules, 47 C.F.R. § 1.80(h), or may file a response showing why forfeiture should not be imposed or should be reduced. Payment of the forfeiture should be sent by check or money order made payable to the Federal Communications Commission, P.O. Box 73482, Chicago, IL 60673-7482.

13. IT IS FURTHER ORDERED that a copy of this Order and Notice of Apparent Liability for forfeiture shall be sent by certified mail, return receipt requested, to each of the above-referenced applicants.

14. This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. Petitions for reconsideration, pursuant to 47 C.F.R. Sec. 1.106, or applications for review, pursuant to 47 C.F.R. Sec. 1.115, may be filed within thirty (30) days of the date of public notice of this order. *See* 47 C.F.R. Sec. 1.4(b).

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-221

In the Matter of

Amendment of Section 73.202(b) RM-8265
Table of Allotments,
FM Broadcast Stations.
(East Wenatchee, Ephrata and Chelan, Washington)

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: July 21, 1993; Released: August 4, 1993

Comment Date: September 24, 1993
Reply Comment Date: October 12, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Hartline Broadcasters ("petitioner"), proposing the allotment of Channel 229C2 at East Wenatchee, Washington, as its second local FM transmission service. In order to accommodate the allotment at East Wenatchee, petitioner also proposes the deletion of vacant Channel 230C2 at Ephrata, Washington, the substitution of Channel 238A for Channel 228A at Chelan, Washington, and the modification of Station KOZI-FM's license accordingly.[1] Petitioner states its intention to apply for the Channel 229C2 at East Wenatchee, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 229C2 at East Wenatchee, Washington, since it could provide the community with its second local FM transmission service. An engineering analysis has determined that Channel 229C2 can be allotted to East Wenatchee in compliance with the Commission's minimum distance separation requirements at petitioner's requested site with a restriction of 6.8 kilometers (4.2 miles) west, provided Channel 230C2 at Ephrata is deleted.[2] The second filing window for this channel closed on May 27, 1993, and no applications were filed. If no applications are filed for Channel 230C2 by the comment date in this proceeding, we will delete the channel. Channel 238A can be substituted for Channel 228A at Chelan, at Station KOZI-FM's licensed site.[3] Since East Wenatchee and Chelan are located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence by the Canadian government has been requested.

3. Whenever an existing station is ordered to switch frequency in order to accommodate a new allotment, we require that the proponent of the new allotment make a commitment that it would reimburse the affected station for the costs incurred in changing frequency. Accordingly, if the channel substitution at Chelan is ultimately adopted, the licensee of Station 228A at Chelan, Washington, is entitled to reimbursement for the reasonable cost involved in the change of its operating channel. *See Circleville, Ohio*, 8 FCC 2d 159 (1967). Petitioner has stated its willingness, if the successful applicant for Channel 229C2 at East Wenatchee, to reimburse Station KOZI-FM for reasonable costs in changing frequency. This reimbursement statement is also expected of any other interested party for Channel 229C2 at East Wenatchee, or any counterproponent whose proposal would likewise require the Chelan substitution. Failure to provide such a commitment could result in a denial of the proposal. *See Brookville and Punxsutawney, Pennsylvania*, 3 FCC Rcd 5555 (1988).

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

[1] Petitioner also proposed removing the reservation on Channel 222C2 at Ephrata and opening that channel for applications. It noted that the Commission's staff substituted Channel 222C2 for Channel 240A at Ephrata at the request of the licensee of Station KULE-FM (formerly KGDN(FM)), Channel 240A, by *Report and Order* in MM Docket No. 87-326, 4 FCC Rcd 307 (1989). Channel 230C2 was also allotted to Ephrata as an additional equivalent class channel for application. Petitioner noted that at the time it filed its petition for rule making, the licensee of Station KULE-FM, Basin Street Broadcasting ("BSB"), had not filed an application to implement the upgrade. Therefore, petitioner contended that the FM Table of Allotments should be modified by deleting the reservation for Channel 222C2 and adding Channel 240A to reflect accurately the operation of Station KULE-FM on Channel 240A. On June 7, 1993, BSB filed a Form 301 application (File No. BPH-930607IF) to upgrade Station KULE-FM to Class C2 facilities at Ephrata.

On June 11, 1993, the Commission advised BSB by letter that a petition for rule making was filed which would be short-spaced to the reference coordinates of vacant Channel 230C2 at Ephrata, Washington, and which requested the deletion of Channel 230C2 at Ephrata and the substitution of Channel 222C2 as an equivalent class channel. The letter also advised BSB that unless an FCC Form 301 application for a construction permit for Class C2 facilities was filed within 30 days, BSB would be a party to the rule making proceeding and its allotment could be downgraded. BSB was also notified that no extensions of this 30-day period would be granted. *See* Letter from Chief, FM Branch, to BSB (June 11, 1993). In light of the application filed on June 7, 1993, the letter is moot, and in addition we will not propose any action with respect to Channel 222C2 at Ephrata.

However, there has been no expression of interest for vacant Channel 230C2 at Ephrata. Accordingly, in order to accommodate petitioner's proposal, we shall propose the deletion of vacant Channel 230C2 at Ephrata.

[2] The coordinates for Channel 229C2 at East Wenatchee are North Latitude 47-25-18 and West Longitude 120-22-53.

[3] The coordinates for Channel 238A at Chelan are North Latitude 47-51-07 and West Longitude 119-52-18.

City	Channel No. Present	Proposed
East Wenatchee, Washington	266A	229C2, 266A
Ephrata, Washington	222C2, 230C2	222C2
Chelan, Washington	228A	238A

5. Accordingly, IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Northcentral Broadcasting, licensee of Station KOZI-FM, Chelan, Washington, SHALL SHOW CAUSE why its license SHOULD NOT BE MODIFIED to specify operation on Channel 238A in lieu of 228A.

6. Pursuant to Section 1.87 of the Commission's Rules, Northcentral Broadcasting may, not later than **September 24, 1993,** file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Northcentral Broadcasting to furnish additional information. If Northcentral Broadcasting raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Northcentral Broadcasting will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

7. IT IS FURTHER ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Notice of Proposed Rule Making and Order to Show Cause* to the following:

Northcentral Broadcasting
P.O. Box 819
Chelan, Washington 98816
(Licensee for Station KOZI-FM)

8. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

9. Interested parties may file comments on or before **September 24, 1993,** and reply comments on or before **October 12, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John F. Garziglia, Esq.
Pepper & Corazzini
1776 K Street, N.W., Suite 200
Washington, D.C. 20006
(Counsel for Petitioner)

10. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

11. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also

expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-97

In the Matter of

Amendment of Section 73.202(b), RM-8203
Table of Allotments,
FM Broadcast Stations.
(Norway, Michigan)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 19, 1993; Released: August 4, 1993

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 8 FCC Rcd 2743 (1993), issued in response to a petition filed by Zephyr Broadcasting Inc. ("petitioner"), proposing the substitution of Channel 232C3 for Channel 232A at Norway, Michigan. Petitioner also requested modification of its license for Station WZNL(FM), Channel 232A, to specify operation on Channel 232C3. Petitioner filed comments in which it reaffirmed its interest in the channel. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 232C3 for Channel 232A at Norway, since it would provide expanded reception service to the community. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at petitioner's specified site.[1] Channel 232C3 is short spaced to Station WRJO, Channel 232A, Eagle River, Wisconsin. However, Channel 233C2 was substituted for Channel 232A im MM Docket 88-313. *See* 4 FCC Rcd 3793 (1989). Station WRJO has a construction permit for Channel 233C2 at a site that is fully spaced to Channel 232C3 at Norway. The grant of a license for Channel 232C3 at Norway may be withheld pending issuance of a license for Station WRJO, Eagle River, on Channel 233C2. Since Norway is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been obtained for this allotment. In addition, we have authorized a modification of the license for Station WZNL(FM), Channel 232A, to specify operation on Channel 232C3, in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 17, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Norway, Michigan	232C3

4. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Nicolet Broadcasting, Inc.
Station WRJO
Box 309
Eagle River, Wisconsin 54521

5. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station WZNL(FM), Norway, Michigan, IS MODIFIED to specify operation on Channel 232C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

6. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Zephyr Broadcasting Inc., licensee of Station WZNL(FM), is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

[1] The coordinates for Channel 232C3 at Norway are 45-46-29 and 87-55-22.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-309

In the Matter of

Amendment of Section 73.202(b),	RM-7097
Table of Allotments,	RM-7310
FM Broadcast Stations.	RM-7488
(Bowdon, Griffin, Hogansville, and Sparta, Georgia)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: July 16, 1993; Released: August 4, 1993

By the Chief, Policy and Rules Division:

1. The Commission has before it petitions for reconsideration[1] filed by Design Media, Inc. ("DMI"), licensee of Station WQUL(FM), Channel 249A, Griffin, Georgia, and Alexander Mitchell Communications Corporation ("AMCC"), licensee of Station WSKS(FM), Channel 249A, Sparta, Georgia. AMCC and DMI seek reconsideration of the *Report and Order* (*"Report and Order"*) in this proceeding, 6 FCC Rcd 4863 (1991).[2] Tarkenton, Smith, Reliance and Jenks filed oppositions to the petition for reconsideration. DMI filed a request for leave to file consolidated reply comments, and filed consolidated replies to oppositions to the petition for reconsideration.

2. The *Report and Order* allotted Channel 288A to Bowdon, Georgia, as that community's first local service in response to proposals filed by Jenks and Bowdon Broadcasters, Inc. In addition, the *Report and Order* denied DMI's petition requesting the substitution of Channel 248C3 for Channel 249A at Griffin, Georgia, and AMCC's petition requesting the substitution of Channel 249C3 for Channel 249A at Sparta, Georgia, and the associated substitution of Channel 288A for Channel 248A at Hogansville, Georgia.

3. AMCC in its petition for reconsideration requested that we reconsider the allotment of Channel 288A to Bowdon, Georgia, and suggested the use of alternate Channel 223A at the community. AMCC stated that the Commission should have preferred the proposals filed by AMCC and DMI requesting upgrades at Sparta and Griffin rather than the new allotment at Bowdon.

4. After the *Report and Order* in this proceeding was adopted, DMI and Good Medicine Radio Georgia, Inc. ("GMR")[3] filed a joint petition for rule making seeking the substitution of Channel 249C3 for Channel 249A at Sparta and the reallotment of Channel 249C3 to Eatonton, Georgia, and the substitution of Channel 249C3 for Channel 249A at Griffin and the reallotment of Channel 248C3 to Fayetteville, Georgia. *See Notice of Proposed Rule Making* (MM Docket No. 92-227), 7 FCC Rcd 6805 (1992). The parties noted that adoption of this joint petition would moot the petitions for reconsideration filed in this proceeding. In a *Report and Order* adopted July 6, 1993, we granted the petition. Therefore, AMCC's and DMI's petitions for reconsideration are now moot.

5. Accordingly, IT IS ORDERED, That the Petitions for Reconsideration filed by Design Media, Inc., and Alexander Mitchell Communications Corporation ARE DISMISSED.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

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[1] Public notice was given October 16, 1991 (Report No. 1865).

[2] DMI also filed a "request for Commission inquiry" and a "petition for stay" of the *Report and Order*. Reliance Broadcasting, Inc. ("Reliance") and Terry C. Jenks ("Jenks") filed comments in support of the "petition for stay." Requests for extension of time and a joint consent motion for extension were filed by Jenks, Dallas M. Tarkenton ("Tarkenton"), and Gleamer L. Smith ("Smith"). Tarkenton and Smith filed oppositions to DMI's request for Commission inquiry. DMI filed a joint response to these oppositions.

In its petition for reconsideration and its "request for Commission inquiry," DMI argued that Jenks engaged in an abuse of the Commission's processes, and that Smith and Tarkenton were the real parties-in-interest in Jenks's counterproposal in violation of Section 73.3513 of the Commission's Rules. DMI requested that the Commission institute an inquiry into its allegations of abuse of process and misrepresentation. The Enforcement Division of the Mass Media Bureau conducted an investigation into these allegations. It found that DMI's claims were unsubstantiated and closed the investigation by letter. *See Letter from Chief, Enforcement Division, Mass Media Bureau to John S. Neely, Esq.*, (February 10, 1993). Therefore, we will not consider DMI's allegations further.

In addition, DMI's petition for stay is now moot, given the termination of this proceeding.

[3] GMR is the current licensee of Station WSKS(FM) pursuant to an application (File No. BALH-920102GW) for assignment of license, granted on February 18, 1992.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-219

In the Matter of

Amendment of Section 73.202(b), RM-8290
Table of Allotments,
FM Broadcast Stations.
(Staples, Minnesota)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 16, 1993; Released: August 4, 1993

Comment Date: September 24, 1993
Reply Comment Date: October 12, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by David J. DeLaHunt d/b/a Normin Broadcasting Company ("petitioner"), requesting the substitution of Channel 234C3 for Channel 234A at Staples, Minnesota. Petitioner also requests modification of its construction permit for Station KSKK, Channel 234A, to specify operation on Channel 234C3. Petitioner submitted information in support of the proposal and expressed its intention to apply for the channel, if allotted.[1]

2. We believe petitioner's proposal warrants consideration. Channel 234C3 can be allotted to Staples, Minnesota, consistent with the Commission's spacing requirements at petitioner's specified site.[2] Since Staples is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government will be obtained for this allotement. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in the use of the higher powered channel at Staples or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such interested party.

3. We believe the public interest would be served by proposing the substitution of Channel 234C3 for Channel 234A at Staples, Minnesota, since it would provide the community with expanded local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Staples, Minnesota	234A	234C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **September 24, 1993,** and reply comments on or before **October 12, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner as follows:

David J. DeLaHunt
Normin Broadcasting Company
P.O. Box 49
Park Rapids, Minnesota 56470

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served

[1] Although petitioner's request indicates that the original copy of its proposal was signed, it failed to include an affidavit verifying that the statements contained in its petition were accurate to the best of its knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.401(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. *See also Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911, n.41 (1990). Petitioner is requested to rectify this omission in its comments.

[2] The coordinates for Channel 234C3 at Staples are 46-23-29 and 94-57-21.

on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-220

In the Matter of

Amendment of Section 73.202(b), RM-8293
Table of Allotments,
FM Broadcast Stations.
(Houston, Alaska)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 16, 1993; Released: August 4, 1993

Comment Date: September 24, 1993
Reply Comment Date: October 12, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the petition for rule making filed on behalf of Evangelistic Alaska Missionary Fellowship, Inc. ("petitioner") seeking the allotment of Channel 221A to Houston, Alaska, as that community's second local FM service. Petitioner stated its intention to apply for Channel 221A if it is allotted to Houston, as requested.

2. We believe the public interest would be served by proposing the allotment of Channel 221A to Houston since it could provide a second local FM service to the community. Channel 221A can be allotted to Houston consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules without the imposition of a site restriction.[1]

3. In view of the above, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Houston, Alaska, as follows:

	Channel No.	
City	Present	Proposed
Houston, Alaska	232A	221A, 232A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **September 24, 1993,** and reply comments on or before **October 12, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Edward W. Hummers, Jr., Esq.
Frank R. Jazzo, Esq.
Fletcher, Heald & Hildreth
11th Floor
1300 North 17th Street
Rosslyn, VA 22209

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Coordinates used for Channel 221A at Houston, Alaska, are 61-38-01 and 149-50-28.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-224

In the Matter of

Amendment of Section 73.202(b), RM-8291
Table of Allotments,
FM Broadcast Stations.
(Farmington, Missouri)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 16, 1993; Released: August 4, 1993

Comment Date: September 24, 1993
Reply Comment Date: October 12, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by KREI, Inc. ("petitioner"), seeking the allotment of Channel 258C3 to Farmington, Missouri, as that community's second FM broadcast service. Petitioner submitted information in support of the proposal and stated its intention to file an application if the channel is allotted to Farmington.[1]

2. We believe petitioner's proposal warrants consideration. Channel 258C3 can be allotted to Farmington, Missouri, in compliance with the minimum distance separation requirements of the Commission's Rules provided there is a site restriction 18.2 kilometers (11.3 miles) southwest of the community.[2] The site restriction will prevent a short spacing to Channel 256C, Station KFUO-FM, Clayton, Missouri, Channel 261A, Station KDJR, De Soto, Missouri, and to Channel 257A, Station KCGQ, Gordonville, Missouri.

3. In view of the fact that the proposed allotment would provide additional broadcast service to Farmington, the Commission believes it would serve the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Farmington, Missouri	253C	253C, 258C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **September 24, 1993,** and reply comments on or before **October 12, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

John E. Fiorini III
James K. Edmundson
Gardner, Carton & Douglas
1301 K Street, N.W., Suite 900, East Tower
Washington, D.C. 20005

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

[1] Farmington is presently served by Stations KREI-AM and KTJJ-FM, both licensed to petitioner.
[2] The coordinates for Channel 258C3 at Farmington are 37-38-45 and 90-32-14.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 93-197

In the Matter of

Revisions to Price
Cap Rules for AT&T

NOTICE OF PROPOSED RULEMAKING

Adopted: June 24, 1993; Released: July 23, 2993

Comment Date: September 21, 1993
Reply Date: October 21, 1993

By the Commission: Commissioner Barrett issuing a statement.

I. INTRODUCTION

1. As the Report on AT&T's performance under price cap regulation adopted today indicates, the AT&T price cap plan has worked well, combining reasonable rates and modest regulatory requirements with strong incentives for productivity growth and innovation. As the Report also discusses, however, certain relatively minor modifications and improvements to the plan may be warranted. In this proceeding we request the submission of additional data and comment on four possible revisions to the AT&T price cap plan. These are: 1) moving Optional Calling Plans (OCPs) such as ReachOut out of AT&T's Basket 1; 2) moving commercial service out of Basket 1; 3) clarifying or revising the monitoring and reporting of AT&T service quality and network reliability, including its Equipment Blockage and Failure (EB&F) report; and 4) revising the price cap treatment of the 800 Directory Assistance (800 DA) service remaining in Basket 2 and the analog private line services remaining in Basket 3.

II. ISSUES FOR COMMENT

A. Optional Calling Plans (OCPs)

2. In the *AT&T Price Cap Performance Review Notice of Inquiry (NOI)*,[1] we suggested that one category of Basket 1 services, optional calling plans (OCPs), might be removed from price caps.[2] OCPs such as AT&T's ReachOut services offer long distance rate discounts or block-of-time rates in exchange for the customer's committing, for example, to payment of a fixed monthly charges or to minimum service periods. These services are optional in the sense that customers may choose to enroll in such plans in lieu of traditional basic schedule per-call rates. These optional plans are typically designed to attract relatively frequent callers, those for whom the discounts and other benefits reduce bills more than the monthly charge or other commitments increase them. In its comments, AT&T agrees that its OCPs are subject to effective competition, pointing out that "MCI, Sprint, and other interexchange carriers have introduced a plethora of OCPs and other offerings designed for and marketed to residential customers."[3] MCI states that if price caps are retained, it might make sense to remove ReachOut from Basket 1.[4]

3. The vigorous competition in optional calling plans is also indicated by the actual rates AT&T has chosen to set. Under price caps, AT&T has consistently priced this category of services substantially below the cap.[5] As of July 1, 1992, for example, the Basket 1 PCI was at 94.4, while the OCPs such as ReachOut America were set more than 7 points lower, at 86.9. In pending filings scheduled to become effective July 1, 1993, AT&T calculates that the Basket 1 PCI will rise slightly to 94.7, but proposes ReachOut rates almost 12 points lower, at 82.9. *Chart 1*. This pattern of pricing ReachOut below the price cap maximum indicates that these services are subject to more competitive price pressure than other Basket 1 services. Thus, moving these services from price caps to streamlined regulation is not likely to affect the actual rates charged for OCPs. Moreover, removal of these services could bring other significant benefits. To the extent that ReachOut services have had larger rate reductions than the standard long distance schedules for which they are substitutes, removal of ReachOut from the basket might help target productivity gains to customers for the standard service. At the same time, removal of ReachOut from price caps would give AT&T more flexibility to compete for optional calling plan services. Customers for these services should also benefit from lower restraints on AT&T's ability to compete for their traffic. Because the current rates for their optional plans already appear to be determined by market forces, not the price cap limits, customers are unlikely to be harmed by streamlined regulation, and they will also retain the opportunity to choose between the standard per-call service or the optional calling plans of AT&T and other carriers.

4. We accordingly believe there is substantial reason to consider moving OCPs from Basket 1 and to streamlined regulation, as we have already done for the services subject to effective competition in Baskets 2 and 3. Commenters may wish to address whether OCPs should be streamlined or made subject to some other regulatory approach, such as a separate basket. The remaining Basket 1 services would be the basic long distance service, MTS, including direct-dial and operator assisted interstate and international calls. The services that might be removed from Basket 1 include services such as ReachOut America, ReachOut World, the Any Saver Plan, and the Small Business Option. Their removal could be acomplished by reinitializing the Basket 1 Actual Price Indexes (APIs) for the remaining Basket 1 services at 100, for example, as of today's date.

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[1] Price Cap Performance Review for AT&T, CC Docket No. 92-134, Notice of Inquiry, 7 FCC Rcd 5322 (1992).
[2] *NOI*, 7 FCC Rcd at 5326, n.26.
[3] AT&T Comments at 15.
[4] MCI Comments at 9.
[5] *See* Public Notice, Chart 1, 7 FCC Rcd 6084, 6086 (1992).

Alternatively, we might maintain the existing APIs and adjust the PCI. In general, we request comment on whether the treatment of OCPs under the AT&T price cap plan should be changed, and if so in what manner.

B. Commercial Customers and Services

5. AT&T proposes in its separate waiver petition that we permanently waive the price cap rules for what it describes as Commercial Long Distance Services. This term, as defined by AT&T, would include "Dial Station calls originated on a line for which the subscriber pays a rate that is described as a business or commercial rate in the applicable local exchange service tariff for switched services."[6] Under its proposal, AT&T would apparently establish at least two different sets of rates, terms and conditions for ordinary long distance calls based upon how the local exchange carrier classifies the customer's local service. Residential customers would apparently be barred from subscribing to the commercial services.[7]

6. AT&T's petition does not indicate the changes it would make in tariffs governing either its residential or its commercial services, but states that the waiver would apply to 12 percent of Basket 1 revenues. It argues that grant of the waiver would largely complete the streamlining of outbound commercial services and permit AT&T to respond more quickly and efficiently to the demands of its commercial customers. It also contends that the same factors that led the Commission to streamline regulation of most Basket 2 and 3 services in the *Interexchange Proceeding* apply with equal force to the Basket 1 services it provides to commercial customers, *i.e.*, vigorous competition from alternative carriers who possess ample transmission capacity, and market share that has declined from 54 percent in 1987 to 39 percent in 1991. AT&T also contends that commercial customers are keenly aware of competitive alternatives, as shown by the annual churn of customer changes between AT&T and its competitors, about 13 percent in 1991.[8]

7. In addition to arguing that AT&T's petition represents an improper and unnecessary attempt to circumvent the performance review and fails to meet the legal burden for grant of a waiver,[9] the oppositions contend that there has been no significant change in the small business market since the *Interexchange Proceeding* decision in August, 1991 that would justify approving AT&T's waiver request.[10] In their view, AT&T remains the dominant provider of Basket 1 services, with substantial ability to control prices in the market. In addition, CompTel contends that AT&T's data are skewed because they exclude resellers of AT&T's services from AT&T's market share and that AT&T does not address other critical information, such as disparities in correspondent agreements and international accounting rates.[11] IDCMA contends that price cap regulation does not impose significant burdens on AT&T's ability to compete, because most of the Basket 1 pricing restraints concern *upward* price changes, not downward changes in response to competitive pressure.[12]

8. MCI believes that AT&T's petition represents an attempt to obtain the ability to impose monthly minimum usage charges on some of its long distance customers without jeopardizing its optional calling plans. In MCI's view, this imposes the burden on AT&T to show whether some users of a "like" service should be subject to such a charge, while others escape it, and requires that we consider the rationale underlying our earlier decision to allow optional calling plans.[13] It also contends that the waiver would exacerbate discrimination AT&T has already imposed by separating commercial and residential MTS, services MCI views as indisputably "like" services under Section 202(a) of the Communications Act.[14]

9. AT&T's proposed permanent waiver of the price cap rules would in fact substantially modify the price cap plan. On the one hand is AT&T's proposal to adopt streamlined regulation of commercial service. It appears plausible that the level of competition for the Basket 1 long distance traffic of business customers may be substantial, and more vigorous than that for other Basket 1 customers. Price cap regulation may also inhibit that competition more than streamlined regulation would. AT&T's data on market share, competitive alternatives, and churn provide some support for this conclusion. Strong competition may effectively prevent unreasonable prices for commercial customers. The flexibility to target offerings to these separate groups of customers, who are also offered services by other carriers, may also permit more attractive offerings and pricing for all customers.

10. Commenters, however, challenge AT&T's market data. It is not clear whether any of the adjustments to market share CompTel asserts should be made would cause us to find that AT&T's market share is larger than it concedes. AT&T appears to exclude optional calling plans from its market share calculations, though some of these are expressly designed for business customers and others are probably used by them. AT&T also provides no data on any cost difference between the two groups of customers and does not explain the justification for using the local exchange carrier's definition of business customers as the basis for establishing different sets of long distance services.

11. In addition, AT&T's proposal would permit it to target new and restructured services only to business customers. For example, if AT&T introduced a service specially adapted to calls linking personal computers, it might restrict the service to business customers, and prohibit its use to residential customers. Alternatively, AT&T might set different rates, terms, and conditions for home and business customers. Moreover, AT&T's proposed classification does not make clear whether it would bar resale of services designated as commercial to residential customers.

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[6] AT&T Waiver Petition at 2, quoting AT&T Tariff F.C.C. No. 1, Section 6.20.

[7] AT&T says that "Commercial Long Distance Services are not currently defined to include optional calling plan services." Petition at 2, fn.4.

[8] AT&T Petition at 13-14.

[9] Opposition of CompTel at 5; Comments of IDCMA; Opposition of MCI at 5; Comments of PacBell; Comments of Sprint at 2.

[10] Comments of LCI International at 4; Comments of Sprint at 2.

[11] CompTel Opposition at 10-11.

[12] Comments of IDCMA at 2.

[13] *See* Guidelines for Dominant Carriers' MTS Rates and Rate Structure Plans, 59 RR 2d 70, 88-89 (1985).

[14] Comments of MCI at 5-7.

12. AT&T's petition therefore raises significant issues concerning restrictions on use and resale, restrictions which have long been prohibited.[15] Customers have the right to use common carrier telecommunications services in any way that is privately beneficial, so long as it is not publicly harmful.[16] For twenty-five years, this Commission has stated that restrictions on the right to resell can segment markets and sustain price discrimination, while barring economically efficient uses of the network. Although classifications such as commercial can be permitted under the Communications Act,[17] it is not clear whether AT&T's planned application of the classification, which includes separate rates, terms, and conditions, as well as significantly different forms of regulation for services subject to the restrictions, is reasonable. Moreover, it is not clear from AT&T's petition or comments what the effects of permitting full implementation of the classifications and concomitant streamlining would be to commercial or residential customers.[18]

13. In sum, we believe that a more complete record should be developed before a decision is made either to grant or to deny AT&T's request to streamline commercial service. Moreover, other options may also warrant consideration. For example, in the event that full streamlining is not justified, an alternative might be to place commercial services in a separate basket. Under this approach, if the competition for commercial services is more intense than for residential, but still not completely effective in assuring reasonable prices, a separate basket might deter cross-subsidization, and still give AT&T substantial flexibility to change commercial rates, terms, and conditions. We request further evidence and comments on these issues.

C. Monitoring of Service Quality and Network Reliability

14. Two problems related to our monitoring of AT&T's service quality have arisen since we issued the AT&T Price Cap Performance Review *Notice of Inquiry*. In the EB&F reports AT&T has filed under price cap regulation, it used the levels of blockage experienced on AT&T's network and the level of blockage from all causes during the six months before price cap regulations began to initialize the indexes measuring subsequent blockages at 100. Higher levels of blockage than the pre-price cap baseline would result in EB&F reports above 100, while below-baseline levels would produce reports below 100. Recently, AT&T informed Commission staff that it discovered a computer programing error in the pre-price cap baseline data used to set the index, and that because of this error data for three months of the period have been incorrect and cannot now be reconstructed.[19] AT&T recomputed the index using data from the last three months of the pre-price cap period, which AT&T asserts is correct. Under the index data as revised, AT&T's EB&F scores under price caps improve. *See Report* Charts 6 (A-D).

15. In addition, AT&T states that it began using a new method of computing EB&F in January, 1993 that excludes Canada and parts of the Caribbean from its calculations. According to AT&T, these changes make comparisons with earlier periods obsolete. AT&T proposes to establish an updated base period using the January-June, 1993 results for future reports.

16. These corrections and revisions in the AT&T EB&F Indexes are a matter of concern because they have the potential to make the Indexes less effective as a tool to monitor AT&T's service quality and network reliability, in particular the extent to which its performance has improved or declined under price cap regulation. The goal of price cap regulation is to provide incentives for increased efficiency. Reductions in price alone do not, however, demonstrate increased efficiency unless quality is maintained or improved. The EB&F Indexes are intended to provide data to assess and identify changes in service quality under price cap regulation.

17. The revised data appear to show that AT&T performance was appreciably better than indicated by the data originally reported. *Report* Charts 6 (A-D). AT&T also claims that its revisions to the index data make it impossible to compare current performance with either the period before price cap regulation or the first three and a half years of price caps. As an initial matter, to clarify the corrections to the indexes it asserts are necessary, we request that AT&T commission and submit an independent audit of all EB&F data, including the initial pre-price cap data and all subsequent data. AT&T is directed to submit the audit report, and the audited EB&F data series as part of its initial comments in this rulemaking. We also request that AT&T provide a full explanation of the reasons for all changes in EF&F methodology and coverage from the initial EB&F report to date. We also request comment on whether our service quality and network reliability monitoring requirements should be revised or clarified to better assure they serve their intended purpose. In particular, we

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[15] Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, 60 F.C.C. 2d 261 (1976), *mod'd on recon.* 62 F.C.C. 2d 588 (1977), *aff'd*, AT&T v. FCC, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978); Regulatory Policies Concerning Resale and Shared Use of Common Carrier Domestic Public Switched Network Services, 83 FCC 2d 167, 175-76 (1980).

[16] *Carterfone*, 13 FCC 2d 420 (1968), recon. denied 14 FCC 2d 571 (1969). *See also Hush-a-Phone v. U.S.*, 238 F.2d 266 (D.C. Cir. 1956).

[17] *See* Section 201(b) of the Communications Act, 47 U.S.C. Section 201(b): "All charges, practices, classifications and regulations for and in connection with such communications service, shall be just and reasonable, and any such charge practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful: *Provided*, That communications by wire or radio subject to this Act may be classified into day, night, repeated, unrepeated, letter, *commercial* [emphasis added], press, Government and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications...."

[18] To date, the effects of AT&T's residential/commercial classification have included: restriction of certain promotional discount offerings either to commercial customers (*see e.g.*, AT&T Trans. No. 5004, filed April 6, 1993) or residential customers (AT&T Trans. No. 5328, filed April 16, 1993); elimination of night/weekend rates and revisions to mileage bands for commercial customers (AT&T Trans. No. 4872, filed March 3, 1993); and introduction of a discount plan limited to residential customers (AT&T Trans. No. 4871, filed March 3, 1993).

[19] Letter from P.J. Aduskevicz, AT&T Distric Manager, Federal Government Affairs to Peyton Wynns, FCC, Dated January 26, 1993.

ask whether we should require AT&T to report EB&F on a basis consistent with the pre-1993 reports, or should adopt additional or different reporting requirements.

D. Regulatory Treatment of Remaining Basket 2 and 3 Services

18. In the *Interexchange Proceeding*, in recognition of the state of competition in the services provided in the interexchange marketplace, we removed most Basket 2 and 3 services from price cap regulation. The only remaining Basket 2 service is 800 Directory Assistance, which remains an AT&T monopoly. The only remaining Basket 3 services are analog private line services, services that are being replaced by digital services. These are both relatively small services in relation to AT&T's total interstate operations or even to the former Baskets 2 and 3. Application of the usual price cap index calculations may thus present different issues for these services, especially for 800 DA. For example, the price cap productivity factor is based on historical productivity growth for all interstate services. This factor may not necessarily be appropriate for a single small service such as 800 DA. Accordingly, we request comment on whether we should revise the price cap formula, baskets, or service bands to accomodate these changes in the compositions of Basket 2 and 3. One posibility, for example, might be to fold Baskets 2 and 3 together, with a separate service band for 800 DA. Basket 2 might also be combined with Basket 1. We request suggestions and comments on these and other possible approaches, consistent with the goals of the AT&T price cap plan.

III. PROCEDURAL MATTERS

19. *Regulatory Flexibility Act.* We certify that the Regulatory Flexibility Act of 1980 does not apply to this rule making proceeding because if rule amendments are promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. The rules at issue in this rulemaking apply only to AT&T Communications, a large corporation. The incidental effects on the interstate long distance rates and services AT&T provides to small business entities is not likely to be significant. The secretary shall send a copy of this Notice of Proposed Rule Making, including the certification, to the chief Counsel for Advocacy of the Small Business Administration in accordance with paragrpah 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq* (1981).

20. *Comment Dates.* Pursuant to applicable procedures set forth in Section 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Section 1.415 and 1.419, interested parties may file comments on or before September 21, 1993 and reply comments on or before October 21, 1993. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you should file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission 1919 M Street, N.W., Washington, D.C. 20554.

21. *Ex Parte Rules - Non-restricted Proceeding.* This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission Rules. *See generally* 47 C.F.R. Section 1.1202, 1.1203, and 1.1206(a).

22. IT IS ORDERED that AT&T shall commission and cooperate fully with a comprehensive audit of all data relating to its Equipment Blockage and Failure Indexes from its inception in 1989 to the present. The audit report shall specify the correct Index data and evaluate the reasons for any revisions to the data by AT&T, including the revisions described in this Notice, and AT&T's explanations for such revisions. The auditor shall also evaluate the basis for any changes in the method used for computing the Indexes, or any other changes AT&T has made or proposes to make that might affect the consistency and comparability of Index data from the initiation of the Index to the present. An original and four copies of the audit report shall be filed as part of AT&T's comments in this docket.

For further information on this proceeding, contact Dan Grosh, Tariff Division, (202) 632-6387.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

SEPARATE STATEMENT OF COMMISSIONER ANDREW C. BARRETT

In Re: The Matter of Price Cap Rules for AT&T

The maintenance of excellent service quality by AT&T under price caps is of paramount importance. The increased efficiency and lower cost structures price caps motivate cannot be achieved at the expense of reduced service quality and reliability. My strong endorsement of price cap regulation for AT&T has been predicated on the belief that market forces, "backstopped" by selective Commission action where appropriate, combine to ensure the desired level of service quality and reliability.

As a threshold matter, the Commission must have the ability to effectively monitor AT&T's service quality performance under price caps in order to evaluate that performance, particularly in comparison to pre-price cap experience. I am concerned with any action or failure to act by AT&T that may potentially impede that ability. Thus, I wholly support the requirements in this *Notice of Proposed Rulemaking* that AT&T commission an independent audit of all equipment blockage and failure (EB&F) reporting data and that AT&T provide full explanation for any changes in methodology used to compute EB&F indexes. More generally, I will welcome parties' comments on whether the Commission's service quality monitoring requirements for AT&T would benefit from revision or clarification.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-223

In the Matter of

Amendment of Section 73.202(b), RM-8294
Table of Allotments,
FM Broadcast Stations.
(Indian River Shores, Florida)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 22, 1993; Released: August 5, 1993

Comment Date: September 27, 1993
Reply Comment Date: October 12, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by deHaro Communications, Inc. ("petitioner"), requesting the allotment of Channel 246A to Indian River Shores, Florida, as that community's first local aural transmission service. Petitioner states its intention to apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 246A to Indian River Shores, Florida, as that community's first local aural transmission service. Channel 246A can be allotted to Indian River Shores in compliance with the Commission's minimum distance separation requirements without a site restriction.[1]

3. The Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Indian River Shores, Florida	--	246A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **September 27, 1993,** and reply comments on or before **October 12, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Cary S. Tepper
Meyer, Faller, Weisman
& Rosenberg, P.C.
4400 Jenifer Street, N.W.
Suite 380
Washington, D.C. 20015
(Attorney for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 246A at Indian River Shores are North Latitude 27-41-10 and West Longitude 80-22-10.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-222

In the Matter of

Amendment of Section 73.202(b), RM-8297
Table of Allotments,
FM Broadcast Stations.
(Moberly, Missouri)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 21, 1993; Released: August 5, 1993

Comment Date: September 27, 1993
Reply Comment Date: October 12, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by KWIX Inc. ("petitioner"), requesting the allotment of Channel 247C3 to Moberly, Missouri, as that community's third FM broadcast service.[1] Petitioner submitted information in support of the allotment at Moberly and stated its intention to file an application if a channel is allotted to the community.

2. We believe petitioner's proposal warrants consideration. Channel 247C3 can be allotted to Moberly, Missouri, in compliance with the minimum distance separation requirements of the Commission's Rules provided there is a site restriction 15.2 kilometers (9.5 miles) east of the community.[2] The site restriction will prevent a short spacing to the construction permit for Station KRLI, Channel 248C3, Malta Bend, Missouri.

3. In view of the fact that the proposed allotment would provide an additional broadcast service to Moberly, Missouri, the Commission believes it would serve the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Moberly, Missouri	284C, 288C3	247C3, 284C, 288C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **September 27, 1993,** and reply comments on or before **October 12, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

John E. Fiorini III
James K. Edmundson
Gardner, Carton & Douglas
1301 K Street, N.W.
Suite 900, East Tower
Washington, D.C. 20005

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

[1] Commission records indicate that petitioner is the licensee of Station KWIX(AM) and Station KRES(FM), Moberly, Missouri. We request petitioner to submit information in its comments indicating its eligibility to own an additional station in Moberly pursuant to our local ownership rules. *See Revision of Radio Rules and Policies*, 7 FCC Rcd 6387 (1992).

[2] The coordinates for Channel 247C3 at Moberly are 39-26-22 and 92-15-28.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-49

In the Matter of

Amendment of Section 73.202(b),	RM-8193
Table of Allotments,	RM-8344
FM Broadcast Stations.	
(Los Lunas, Espanola and Pojoaque, New Mexico)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 21, 1993; Released: August 5, 1993

By the Chief, Allocations Branch:

1. At the request of Elliott McDowell ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 2102 (1993), proposing the substitution of Channel 273C for Channel 273C2 at Los Lunas, New Mexico, and the modification of Station KOYT's license to specify the higher class channel. To accommodate the upgrade at Los Lunas, the Commission also proposed that Channel 225C3 be substituted for Channel 272C3 at Espanola, New Mexico, and the license of Station KIOT be amended to specify the alternate Class C3 channel.[2] Petitioner filed comments reiterating its intention to apply for the channel, if allotted. Cheryl S. Potter ("Potter") filed comments and a counterproposal requesting the allotment of Channel 225C3 to Pojoaque, New Mexico, as the community's first local service, instead of the channel's use at Espanola.[3]

2. We believe the public interest would be served by substituting Channel 273C for Channel 273C2 at Los Lunas since it could enable Station KOYT to expand its coverage area and provide the community with a higher class wide coverage area service. We will also substitute Channel 225C3 for Channel 272C3 at Espanola. Channel 273C can be allotted to Los Lunas in compliance with the Commission's minimum distance separation requirements with a site restriction of 51.8 kilometers (32.2 miles) northeast to accommodate petitioner's desired transmitter site. Channel 225C3 can be allotted to Espanola with a site restriction of 16.2 kilometers (10.1 miles) northeast to avoid short-spacings to Stations KRWN, Channel 225C1, Farmington, and KRST, Channel 222C and KKOB-FM, Albuquerque, New Mexico, and to accommodate petitioner's desired transmitter site.[4] As proposed, Station KOYT's license will be modified to specify operation on Channel 273C and Station KIOT's license will be modified to specify operation on Channel 225C3.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 20, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Espanola, New Mexico	225C3
Los Lunas, New Mexico	273C, 292C1

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the licenses of Elliott McDowell for Station KOYT, Los Lunas, New Mexico, IS MODIFIED to specify operation on Channel 273C, in lieu of presently authorized Channel 273C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of Elliott McDowell for Station KIOT, Espanola, New Mexico, IS MODIFIED to specify operation on Channel 225C3 in lieu of Channel 272C3, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station KIOT's construction permit, BPH-910510IF, except the channel as specified above. Any other changes, except those so

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[1] The community of Pojoaque has been added to the caption.

[2] It was not necessary to issue an *Order to Show Cause* to the licensee of Station KIOT at Espanola since the petitioner is the licensee of the station.

[3] Public Notice of the filing of the counterproposal was given on May 25, 1993, Report No. 1942. However, on June 29, 1993, petitioner and Potter filed a "Joint Request for Approval of Agreement" whereby Potter has requested that her counterproposal be dismissed. In accordance with Section 1.420(j) of the Commission's Rules, the petitioner has provided a copy of the agreement showing that Potter will not be reimbursed for more than the legitimate and prudent expenses incurred in filing the counterproposal. Therefore, we will dismiss Potter's counterproposal.

[4] The coordinates for Channel 273C at Los Lunas are North Latitude 35-12-42 and West Longitude 106-26-57. The coordinates for Channel 225C3 at Espanola are 36-04-41; 105-56-16.

specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules. PROVIDED the transmission facilities comply in all respects with construction permit BPH-910510IF, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

6. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Elliott McDowell, licensee of Stations KOYT, Los Lunas, New Mexico, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

7. IT IS FURTHER ORDERED, That the counterproposal of Cheryl S. Potter to allot Channel 225C3 to Pojoaque, New Mexico (RM-8344), IS DISMISSED.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-230

In the Matter of

Amendment of Section 73.202(b), RM-8298
Table of Allotments,
FM Broadcast Stations.
(Madison, South Dakota and
Slayton, Minnesota)

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: July 23, 1993; Released: August 5, 1993

Comment Date: September 27, 1993
Reply Comment Date: October 12, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Wallace Christensen ("petitioner"), requesting the substitution of Channel 276C2 for Channel 276A at Slayton, Minnesota. Petitioner also requests modification of his construction permit (BPH-921216MC) for Channel 276A to specify operation on the higher class channel.[1] Petitioner provided an engineering study in support of the proposal and indicated he would apply for the channel, if allotted.

2. We believe petitioner's proposal warrants consideration because the proposed substitution would provide Slayton with a wide coverage area FM service. Petitioner notes that Channel 276C2 can be allotted to Slayton, Minnesota, in compliance with the minimum distance separation requirements of the Commission's Rules provided Channel 288A is substituted for Channel 276A at Madison, South Dakota.[2] Station KJAM-FM operates on Channel 276A at Madison. The proposed substitution at Madison can be accomplished in compliance with the minimum distance separation requirements of the Commission's Rules at the current site of Station KJAM-FM.[3] We shall also propose to modify the construction permit for Channel 276A to specify operation on Channel 276C2 in accordance with Section 1.420(g) of the Commission's Rules.

3. Whenever an existing licensee is ordered to switch frequencies in order to accommodate a new channel allotment, we require the proponent of a new allotment to make a commitment that it would reimburse the affected station for the costs incurred in changing frequencies. Petitioner has acknowledged his responsibility to reimburse Station KJAM-FM, Madison, South Dakota, for the reasonable costs in changing frequency.

4. In view of the above, we believe the public interest would be served by proposing the allotment of Channel 276C2 to Slayton, Minnesota, since it would provide the community with its first wide coverage area FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
Community	Present	Proposed
Madison, South Dakota	276A	288A
Slayton, Minnesota	276A	276C2

5. IT IS ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, Madison Broadcasting Co., Inc., the licensee of Station KJAM-FM, Madison, South Dakota, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 288A in lieu of Channel 276A.

6. Pursuant to Section 1.87 of the Commission's Rules, Madison Broadcasting Co., Inc., may not later than **September 27, 1993,** file a written statement showing with particularity why their respective authorizations should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Madison Broadcasting Co., Inc. to furnish additional information. If Madison Broadcasting Co., Inc. raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Madison Broadcasting Co., Inc. will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

7. IT IS FURTHER ORDERED, That the Secretary Shall Send by Certified Mail, Return Receipt Requested, a copy of this Notice of Proposed Rule Making and Order to Show Cause to the following:

Madison Broadcasting Co., Inc.
Station KJAM-FM
Post Office Box D
101 S. Egan Avenue
Madison, South Dakota 57042

8. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we

[1] The construction permit for Channel 276A was granted on July 8, 1993, and expires on January 8, 1995.
[2] The coordinates for Channel 276C2 at Slayton are 43-55-16 and 95-57-57.
[3] The coordinates for Channel 288A at Madison are 43-59-08 and 97-07-42.

note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

9. Interested parties may file comments on or before **September 27, 1993,** and reply comments on or before **October 12, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Dennis F. Begley
Reddy, Begley & Martin
1001 22nd Street, N.W., Suite 350
Washington, D.C. 20037

10. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

11. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-228

In the Matter of

Amendment of Section 73.202(b), RM-8295
Table of Allotments,
FM Broadcast Stations.
(Tawas City, Michigan)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 22, 1993; Released: August 5, 1993

Comment Date: September 27, 1993
Reply Comment Date: October 12, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Ives Broadcasting, Inc. ("petitioner"), requesting the substitution of Channel 291A for Channel 297A at Tawas City, Michigan. Petitioner also requests modification of its license for Station WDBI-FM, Channel 297A, to specify operation on Channel 291A. Petitioner provides information in support of the proposal and states its intention to apply for the channel, if allotted to Tawas City.

2. Petitioner states that Station WDBI-FM, which is currently operating on Channel 297A as a three kilowatt station, is precluded from upgrading to six kilowatts. Channel 297A, if operated at six kilowatts, is short spaced to a Canadian Channel 297C allotment at Sault Ste. Marie, Ontario. According to petitioner, the short spacing results from the adoption of increased separation distances for Class A stations in *Second Report and Order*, MM Docket 88-375, 4 FCC Rcd 6375 (1989). In order to premit operation of Station WDBI-FM as a six kilowatt facility, petitioner seeks to eliminate the short spacing between the domestic WDBI-FM facility and the foreign allotment by substituting Channel 291A for Channel 297A at Tawas City.

3. We believe the public interest would be served by proposing the substitution of Channel 291A for Channel 297A at Tawas City, Michigan, and modification of the license for Station WDBI-FM to specify the new channel since it would permit operation of Station WDBI-FM as a six kilowatt facility. A Commission analysis indicates that Channel 291A can be allotted to Tawas City in compliance with the Commission's minimum distances separation requirements at petitioner's specified site.[1] Since Tawas City is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government will be obtained for this allotment.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Tawas City, Michigan	284C2, 297A	284C2, 291A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **September 27, 1993,** and reply comments on or before **October 12, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

John F. Garziglia
Pepper & Corazzini
1776 K Street, N.W., Suite 200
Washington, D.C. 20006

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the

[1] The coordinates for Channel 291A at Tawas City are 44-16-27 and 83-39-42.

proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-227

In the Matter of

Amendment of Section 73.202(b), RM-8292
Table of Allotments,
FM Broadcast Stations.
(Marathon and Stevens Point,
Wisconsin)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 22, 1993; Released: August 5, 1993

Comment Date: September 27, 1993
Reply Comment Date: October 12, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Eagle of Wisconsin, Inc. ("petitioner"), requesting the substitution of Channel 285A for Channel 285C3 at Marathon, Wisconsin, and reallotment of Channel 285A to Stevens Point, Wisconsin.[1] Petitioner also requests modification of its authorization for Station WMGU(FM) to specify operation on Channel 285A at Stevens Point. Petitioner states it will apply for Channel 285A at Stevens Point.

2. Petitioner seeks to invoke the provisions of Section 1.420(i) of the Commission's Rules, which permit the modification of a station's license to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest. *See Modification of FM License* (*"Change of Community R&O"*), 4 FCC Rcd 4870, *recon. granted in part* (*"Change of Community MO&O"*), 5 FCC Rcd 7094 (1990). Petitioner recognizes that the Commission prohibits the removal of a community's sole local transmission service, except "in rare circumstances where removal of a local service might serve the public interest." *Change in Community MO&O*, 5 FCC Rcd at 7096. Petitioner claims that removal of Marathon's sole local transmission service is warranted in this case.

3. Petitioner acknowledges that the reallotment and downgrading of Channel 285 would provide Stevens Point with its second commercial FM channel.[2] Petitioner notes that WMGU(FM) was originally licensed to operate on Channel 285A at Stevens Point, Wisconsin. However, at petitioner's request, Channel 285C3 was substituted for Channel 285A and the community of license changed from Stevens Point to Marathon. *See* 6 FCC Rcd 3649 (1991). Further, petitioner filed an application and was granted a construction permit to operate on Channel 285C3 at Marathon.[3] The Marathon station was never constructed, and petitioner has now determined that the construction and operation of a station at Marathon is neither practical nor feasible. Petitioner contends that allotment of Channel 285A at Stevens Point at its requested site will allow the station to expand its coverage by operating as a six kilowatt facility rather than a three kilowatt facility. Petitioner argues that since Station WMGU(FM) is currently off-the-air in Stevens Point and is unable to construct a station to serve Marathon, the public is better served by reallotting Channel 285 to Stevens Point to operate as a full class A facility.

4. We do not generally believe that the public interest is served by removing a community's sole local service merely to provide a transmission service to another community. Although the removal of Channel 285C3 from Marathon will remove that community's only potential local service, Channel 285A will provide expanded service to Stevens Point. However, since Station WMGU(FM) has never been on the air in Marathon, a change in community will not cause any disruption to existing reception or transmission service. Therefore, we initially accept petitioner's claims that it is neither practical nor economically feasible to operate a station in Marathon, and we believe the public interest could be served by seeking comments on this proposal. We request comments on our tentative conclusion that a waiver of our restriction on removal of sole existing local transmission service is warranted in this instance. Petitioner is requested to provide information explaining why the allotment at Marathon is neither practical nor feasible, as well as any other information regarding the public interest benefits of this proposal.

5. As requested, we shall propose to modify the authorization for Channel 285C3, Station WMGU(FM), Marathon, to specify operation on Channel 285A at Stevens Point, Wisconsin, in accordance with Section 1.420(i) of the Commission's Rules. An engineering analysis has determined that Channel 285A can be allotted to Stevens Point in compliance with the Commission's minimum distance separation requirements at petitioner's specified site 9 kilometers (5.6 miles) northwest of the community.[4] The site restriction will prevent a short spacing to Channel 285A, Station WNFM, Reedsburg, Wisconsin. We shall not accept competing expressions of interest in the use of Channel 285A at Stevens Point or require the petitioner to demonstrate the availability of an additional equivalent class channel at Stevens Point.

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[1] An application for the assignment of the license for Station WMGU(FM), Stevens Point, from petitioner to Seehafer Broadcasting Corporation has been accepted for filing (BALH-930129GJ).

[2] Station WMGU(FM) is presently silent pursuant to Commission authorization. Stations WSPO(AM)/WSPT(FM), Stevens Point are both licensed to Americus Communications #1 Limited Partnership.

[3] The construction permit for Channel 285C3 at Marathon expired on June 2, 1993 (BPH-910830ID). Petitioner has requested forfeiture of the construction permit for Channel 285C3 at Marathon.

[4] The coordinates for Channel 285A at Stevens Point are 44-35-25 and 89-37-31.

6. Accordingly, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following communities:

	Channel No.	
City	Present	Proposed
Marathon, Wisconsin	285C3	---
Stevens Point, Wisconsin	250C1	250C1, 285A

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **September 27, 1993,** and reply comments on or before **October 12, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Allan G. Moskowitz
Kaye, Scholer, Fierman, Hays & Handler
901 15th Street, N.W., Suite 1100
Washington, D.C. 20005

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

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FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

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of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

IDB Communications Group, Inc. — File Nos. I-T-C-93-100-TC, EID-692

and

International Communications Holdings, Inc.

Application for Authority to Transfer Control of TRT Communications, Inc.

TRT/FTC Communications, Inc. — File No. CSG-93-063-(5)-AL

and

Southwest Communications, Inc.

Application for Consent to the Assignment of Title III International Fixed Earth Stations

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: July 26, 1993; **Released: August 5, 1993**

By the Acting Chief, Common Carrier Bureau:

I. INTRODUCTION

1. International Communications Holdings, Inc. (ICHI) and IDB Communications Group, Inc. (IDB)(hereinafter referred to jointly as "Applicants") filed the above-captioned application requesting authority to transfer control of TRT Communications, Inc. (TRT) from ICHI to IDB. The application also requests approval of interlocking carrier directorates within the IDB group of carriers, and the authorization of Pacific Telecom, Inc. (PTI), the 85.1% owner of ICHI, to appoint one director to the IDB Board of Directors. In a related application, TRT/FTC Communications, Inc. (TRT/FTC) and Southwest Communications, Inc. (SCI) seek authority to assign TRT/FTC's Title III international earth station authorizations to SCI. The applications, filed pursuant to Sections 212, 214 and 310 of the Communications Act of 1934 (the Act), as amended, 47 U.S.C. §§212, 214, and 310, Section 1 of the Submarine Cable Landing Act of 1921 (Cable Act), 47 U.S.C. §34, and Parts 1, 62 and 63 of the Commission's Rules, 47 C.F.R. Parts 1, 62 and 63, were submitted on February 5, 1993. The applications were placed on public notice February 17, 1993, and no comments were received. For the reasons set forth below, we grant the above-captioned applications.

II. BACKGROUND

2. IDB is a U.S. international common carrier, that, with its subsidiaries and affiliates,[1] operates a domestic and international communications network, providing radio and television transmission services, mobile satellite services, international private line voice and data circuits and international public switched telephone services. The IDB group of carriers, except for IDB Mobile, is regulated as nondominant on all routes except to the United Kingdom and Germany.[2]

3. ICHI, a Delaware corporation, wholly owns TRT. PTI, a Washington Corporation, owns 85.1% of ICHI. The other 14.9% of ICHI is owned by France Telecom. PTI, through ICHI and other subsidiaries, has extensive interests in domestic and international telecommunications operations, though neither PTI nor ICHI claims to be a common carrier pursuant to the Act.

4. TRT, a Delaware corporation, is a holding company. In June 1990, TRT consolidated its telecommunications common carrier subsidiaries TRT Telecommunications Corporation and FTC Communications, Inc., into TRT/FTC. Historically, those carriers were the two smallest international record carriers. They are classified as nondominant, except for communications between the United States and France, due to France Telecom's ownership interest in ICHI, TRT's parent.[3]

5. SCI, a Delaware corporation, has no foreign owners, officers or directors. SCI was authorized a year ago by the Commission to be the assignee of the existing Title III licenses of IDB and CICI.[4] While IDB and CICI retained ownership of the facilities, SCI controls, operates and maintains the systems under a long term (10 year) operator

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[1] IDB is the parent corporation of the following carriers: CICI, Inc., IDB Communications Corporation, IDB Mobile Communications, Inc. (IDB Mobile), World Communications, Inc., and Satellite Transmission Specialists Company.

[2] Until recently, the IDB group of carriers was regulated as dominant on all routes under the Commission's *International Competitive Carrier* decision, 102 FCC 2d 812 (1985), *recon. denied*, 60 RR 2d 1435 (1986), due to foreign ownership of IDB in excess of 15 percent. However, the IDB group, except for IDB Mobile, has filed two separate applications for nondominant status for all authorized services under the Commission's new dominant carrier rules announced in *Regulation of International Common Carrier Services*, 7 FCC Rcd 7331 (1992), *errata*, 8 FCC Rcd 452 (1993)(*International Services*). Specifically, the first application, File No. ISP-93-008-ND, requests nondominant status to all countries except the United Kingdom and Germany. This application was subject to the Commission's streamlined grant procedures, and in the absence of any opposition, was granted automatically July 24, 1993. The second application, File No. ISP-93-009, was for nondominant status to the United Kingdom and Germany. This application was not subject to streamlined grant procedures, and remains pending.

[3] Prior to its consolidation with TRT, FTC Communications was deemed to be nondominant for all international telecommunications, with the exception of the provision of services between the United States and France. *FTC Communications, Inc.*, 4 FCC Rcd 5633 (1989).

[4] *See CICI, Inc. et al.*, 7 FCC Rcd 6031 (Int. Fac. Div. 1992).

agreement with IDB and CICI. Neither IDB nor CICI have any ownership interest in SCI, nor does SCI have any ownership interest in IDB or CICI.

III. DISCUSSION

6. The Applicants request authority to transfer control of TRT and its subsidiaries' Title II authorizations and interests in cable landing licenses[5] through a two-step exchange of stock and cash. The first step already occurred upon the signing of the Exchange Agreement between IDB, ICHI, PTI Harbor Bay, Inc. (Harbor Bay)[6] and PTI on January 22, 1993. In that step ICHI and Harbor Bay paid in cash to IDB $12,714.28 and $285.72, respectively, and Harbor Bay delivered to IDB all of the capital stock of Niles Canyon Earth Station, Inc. (Niles Canyon).[7] In return, IDB issued to ICHI and Harbor Bay 1,271,428 and 28,572 shares of IDB Common Stock, respectively. The second step is to occur at the closing of the transaction, after FCC and all other regulatory approval has been given. At that stage, ICHI will transfer to IDB all of the outstanding common stock of TRT. However, all of TRT's Title III authorizations will be assigned to SCI,[8] which will control and operate the earth station facilities pursuant to the existing operator agreement it has with IDB and CICI.[9] In return, IDB will issue to ICHI 3,129,670 shares of IDB Common Stock, and deliver to ICHI $978,022 in cash. IDB also will issue to Harbor Bay 70,330 shares of IDB Common Stock and deliver to Harbor Bay $21,978 in cash. In addition, so long as at least 10% of the outstanding shares of IDB Common Stock is held by PTI and its direct or indirect majority-owned subsidiaries (the "PTI Group"), ICHI or its designee in the PTI Group will be able to appoint one member of the Board of Directors of IDB. Upon completion of this transaction, the PTI Group will own about 24% of IDB's outstanding stock.

7. The Applicants state that in order to compete effectively, and indeed to survive in the intensely competitive telecommunications marketplace, smaller carriers must offer a wide array of innovative, high quality reliable transmission services to a broad range of domestic and international geographic markets. According to the Applicants, the proposed acquisition of TRT by IDB will substantially advance efforts to meet these marketplace requirements. Moreover, the applicants state that the combined market shares of IDB and TRT are small in comparison to their competitors' market share.

8. The proposed consolidation of TRT into IDB, argue the Applicants, will result in operational efficiencies and economies, will lower the operating costs of the companies, and will enable them to offer services at competitive rates. In particular, TRT has incurred substantial financial losses primarily because its larger competitors are bundling domestic/international services beyond the range of TRT's limited offerings, at discount rates which TRT has been unable to meet. Thus, the Applicants explain that TRT's offering of international services will be enhanced substantially by IDB's domestic base of teleports, earth stations and audio/video transmission services which will enable TRT to provide more comprehensive, end-to-end service to its domestic customers.[10] The Applicants also assert that authorization of the transfer of control of TRT will further Commission efforts to foster competition and give the public a broader choice of service offerings and carrier suppliers. In view of the foregoing, we conclude that the transfer of control from ICHI to IDB of TRT's submarine cable landing licenses and Section 214 authorizations, as well as the assignment of TRT/FTC's Title III authorizations to SCI, will serve the public interest.

9. However, we note that, after the proposed transfer of control, TRT and its subsidiaries will remain subject to dominant carrier regulation to France. In addition, TRT and its subsidiaries will be regulated as dominant to the United Kingdom and Germany, as are all members of the IDB group, due to IDB's foreign ownership.[11] We will regulate TRT and its subsidiaries as dominant to these points for all authorized services unless and until TRT can demonstrate, pursuant to Section 63.13 of the Commission's Rules,[12] that it qualifies for nondominant regulation because it lacks an affiliation with a foreign carrier that has the ability and incentive to discriminate in its favor on these routes.[13]

10. We also have before us, as a part of this application, a request for authority pursuant to Section 212 of the Act for PTI to appoint one of the nine directors on the IDB Board and the approval of interlocking directorates among TRT, IDB, Worldcom, IDB Communications Corporation, CICI, Inc., Satellite Transmission and Reception Specialists Company, and IDB Aero-Nautical Communications, Inc., all of which will be commonly owned.

11. Section 212 of the Act prohibits persons from holding the position of, or nominating, an officer or director of more than one carrier unless authorized by the Commission upon a showing that neither public nor private interests will be adversely affected by the interlock. In determining whether the public or private interests will be adversely affected, the Bureau considers a number of different factors, including, but not limited to, the potential for anticompetitive conduct, a possible diminution in the independence of each carrier involved, and the possibility

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[5] *See* Attachment A for a list of the Title II authorizations and interests in cable landing licenses involved.

[6] Harbor Bay is a 100% owned subsidiary of PTI, and does not hold any FCC authorizations or licenses.

[7] Niles Canyon is a Delaware corporation which owns real estate at the Bay Area Teleport. Niles Canyon does not hold any FCC authorizations or licenses.

[8] *See* Attachment B for a list of the Title III Earth Station authorizations being assigned.

[9] *See supra* para. 5.

[10] *See* TRT Application at p.5.

[11] *See supra* at fn.2.

[12] *See* 57 Fed. Reg. 57,964 (1992) (to be codified at 47 C.F.R. §63.13 (1993)).

[13] Future Commission action on IDB's pending application for nondominant status to the United Kingdom and Germany will not automatically change TRT's regulatory status since TRT has not been specifically included in those applications, nor has the Commission received in this proceeding all of the information and certifications required by Section 63.13 of the Commission's Rules to make a nondominant determination for TRT and its subsidiaries.

of conflicts of interest on the part of common directors or officers in violation of the fiduciary duties imposed on persons occupying these positions.[14]

12. After due consideration of the facts and circumstances presented by this application, we find that grant of IDB's request for approval pursuant to Section 212 would serve the public interest by permitting efficient management, coordination, and shared experience in the highly competitive telecommunications marketplace without adversely affecting public or private interests.

IV. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED that the application of IDB Communications Group, Inc. and International Communications Holdings, Inc., File No. I-T-C-93-100-TC IS GRANTED and ICHI is authorized to transfer to IDB control of TRT Communications, Inc. and its subsidiaries, and their submarine cable landing licenses and Section 214 authorizations listed in Attachment A.

14. IT IS FURTHER ORDERED that the application of TRT/FTC Communications, Inc. and Southwest Communications Inc., File No. CSG-93-063-(5)-AL IS GRANTED and TRT/FTC is authorized to assign to SCI the Title III International Fixed-Satellite Earth Station licenses of TRT/FTC listed in Attachment B.

15. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 212 of the Communications Act, 47 U.S.C. §§ 154(i) and 212, and the authority delegated under Section 0.291 of the Commission's Rules, 47 C.F.R. Section 0.291, that the application File No. EID-692 for authority for PTI to appoint one member of the IDB board of directors IS GRANTED.

16. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 212 of the Communications Act, 47 U.S.C. §§ 154(i) and 212, and the authority delegated under Section 0.291 of the Commission's Rules, 47 C.F.R. Section 0.291, that the application File No. EID-692 for approval for interlocking directorates among TRT, IDB, Worldcom, IDB Communications Corporation, CICI, Inc., Satellite Transmission and Reception Company, and IDB Aero-Nautical Communications, Inc. IS GRANTED.

17. IT IS FURTHER ORDERED that grant of these applications is subject to the condition that ICHI as a principal shareholder of IDB, and any Persons who are individual shareholders and/or officers/directors of IDB and who are also individual shareholders and/or officers/directors of SCI, a Title III licensee, shall not enter into any agreement, contract or understanding that shall limit the independent exercise of control by those Persons over SCI.

18. IT IS FURTHER ORDERED that grant of application File No. I-T-C-93-100-TC is subject to the condition that TRT and its subsidiaries be classified as dominant in the provision of authorized international telecommunications services to France, the United Kingdom and Germany.

19. IT IS FURTHER ORDERED that TRT and its subsidiaries shall maintain tariffs, pursuant to Section 203 of the Communications Act of 1934, as amended, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for its authorized services.

20. IT IS FURTHER ORDERED that TRT and its subsidiaries may not -- and the tariffs of TRT and its subsidiaries must state that their customers may not -- resell international private lines or connect them to the public switched network for the provision of international basic telecommunications services, unless authorized to do so by the Commission upon a country-specific finding of resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending*.

21. IT IS FURTHER ORDERED that TRT and its subsidiaries shall file quarterly reports of revenue, number of messages, and number of minutes of both originating and terminating traffic for all international services between the United States, France, the United Kingdom, and Germany within 90 days from the end of each calendar quarter.

22. IT IS FURTHER ORDERED that TRT and its subsidiaries shall continue to file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

23. IT IS FURTHER ORDERED that TRT and its subsidiaries shall continue to file all arrangements for private line interconnection to the U.S. public switched network, pursuant to Section 43.51(a)(3) of the Commission's Rules, 47 C.F.R. §43.51(a)(3).

24. IT IS FURTHER ORDERED that TRT and subsidiaries shall continue to comply with any current and future Commission policies and requirements concerning international accounting and settlement rates and shall file copies of any operating agreements entered into by TRT or its subsidiaries that affect traffic or revenue flows to or from the U.S. within 30 days of its execution.

25. IT IS FURTHER ORDERED that TRT and its subsidiaries shall seek, pursuant to Section 63.01 of the rules, additional authorization under Section 214 of the Communications Act before adding or deleting circuits to France, the United Kingdom, and Germany.

26. IT IS FURTHER ORDERED that TRT and its subsidiaries shall continue to file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. Section 63.15(b).

27. IT IS FURTHER ORDERED that IDB, TRT, and their subsidiaries shall report all interlocking directors and officers, pursuant to Section 62.26 of the Commission's Rules, 47 C.F.R. §62.26.

28. IT IS FURTHER ORDERED that neither IDB nor any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any

[14] *See In re Application of James A. Dwyer*, 2 FCC Rcd 4278 (Com. Car. Bur. 1987) *citing In re Application of Walter Gifford*, 2 FCC 741 (1935).

concession, contract, understanding, or working arrangement to which IDB or any persons or companies controlling it or controlled by it are parties.

29. This Order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief, Common Carrier Bureau

ATTACHMENT A

FCC LICENSES AND AUTHORIZATIONS COVERED BY APPLICATION

I. SUBMARINE CABLE LANDING LICENSES TRT/FTC Communications, Inc.

File No.	Description
S-C-L-47	BRUS and VENEZUELA II Cable System
S-C-L-51	TAT-7 Cable System
S-C-L-51A	TAT-7 Cable System
S-C-L-53	Fla.-St. Thomas III Cable System
S-C-L-84-001	TAT-8 Cable System
S-C-L-85-003	HAW-4/TPC-3 and GP-2 Cable System
S-C-L-88-003	G-P-T Cable System
S-C-L-88-004	TAT-9 Cable System
S-C-L-89-004	TPC-4 Cable System
S-C-L-90-003	PacRimEast Cable System
S-C-L-90-004	HAW-5 Cable System
S-C-L-90-005	PacRimWest Cable System
S-C-L-91-001	TAT-10 Cable System
S-C-L-91-002	TAT-11 Cable System
S-C-L-92-002	TAINO-CARIB Cable System
S-C-L-92-005	TPC-5 Cable System
S-C-L-93-001	COLUMBUS II Cable System
S-C-L-93-002	AMERICAS-1 Cable System
S-C-L-93-004	TAT-12/TAT-13 Cable Network

II. SECTION 214 AUTHORIZATIONS

(The File Nos. shown are both those of the underlying basic direct operating certificate, as well as the various authorizations for supplemental cable and satellite facilities subsequently obtained.)

TRT/FTC COMMUNICATIONS, INC.

Countries	File Nos.
North America	
Canada	I-T-C-82-259; I-T-C-81-334; I-T-C-83-104; I-T-C-89-086
Mexico	T-C-2307; I-T-C-85-002; I-T-C-93-029
Europe	T-C-1745-1; I-T-C-82-029; I-T-C-84-072;
Austria	I-T-C-2335-6; I-T-C-81-184; I-T-C-82-153; I-T-C-82-212; I-T-C-83-061; I-T-C-85-122
Belgium	T-C-2462-17; I-T-C-82-154; I-T-C-84-205
Cyprus	I-T-C-85-084
Denmark	I-T-C-81-144; I-T-C-83-030; I-T-C-85-179
Finland	I-T-C-81-145; I-T-C-83-182; I-T-C-84-018
France	I-T-C-2972; T-C-1358; T-C-1745; T-C-2174; T-C-2194; T-C-2336-3; T-C-2356-2; I-T-C-2914; I-T-C-2954; I-T-C-2638; I-T-C-2649-3; I-T-C-2336-14; I-T-C-2764; I-T-C-2649-2; I-T-C-2649-4; I-T-C-2336-7; I-T-C-2336-9; T-C-2336; T-C-2356; T-C-2356-1; I-T-C-81-120; I-T-C-81-276; I-T-C-81-264; I-T-C-82-094; I-T-C-82-242; I-T-C-82-266; I-T-C-83-018-M; I-T-C-83-059; I-T-C-83-071; I-T-C-83-080; I-T-C-83-098; I-T-C-83-107; I-T-C-83-122; I-T-C-84-005; I-T-C-85-180; I-T-C-86-007; I-T-C-86-036; I-T-C-86-041; I-T-C-87-075; I-T-C-88-181; I-T-C-90-135; I-T-C-91-136; I-T-C-93-062
Germany	T-C-2335-4; I-T-C-2954; I-T-C-81-026; I-T-C-81-095; I-T-C-81-207; I-T-C-82-135; I-T-C-85-148; I-T-C-88-058; I-T-C-90-179; I-T-C-91-135
Greece	I-T-C-81-173; I-T-C-83-182; I-T-C-86-128
Hungary	I-T-C-83-169
Iceland	I-T-C-2645
Italy	T-C-2335-1-A; I-T-C-2954; I-T-C-81-091; I-T-C-83-167; I-T-C-93-029
Ireland	I-T-C-81-345; I-T-C-82-003; I-T-C-82-174; I-T-C-82-291
Luxembourg	I-T-C-80-031
Kenya	I-T-C-89-133
Netherlands	T-C-2462-27; I-T-C-82-017; I-T-C-91-135
Norway	I-T-C-81-146; I-T-C-82-052
Poland	I-T-C-89-133
Portugal	I-T-C-2462-37; I-T-C-3114; I-T-C-81-127; I-T-C-84-113; I-T-C-93-029
Spain	I-T-C-2335-7; I-T-C-2954; I-T-C-83-182; I-T-C-86-128; I-T-C-88-181; I-T-C-93-029
Sweden	I-T-C-2971; I-T-C-82-002; I-T-C-84-075; I-T-C-87-019
Switzerland	I-T-C-2462-9; I-T-C-2336-13; I-T-C-2992; I-T-C-2764
Turkey	I-T-C-89-133

United Kingdom	T-C-2335-3; T-C-1684; T-C-1818; T-C-2112; I-T-C-2112-2; I-T-C-2336-4; I-T-C-2336-5; I-T-C-2336-5-A; I-T-C-2336-6; I-T-C-2954; I-T-C-3207; I-T-C-2649; I-T-C-2649-3; I-T-C-2764; I-T-C-2649-2; I-T-C-2649-4; I-T-C-2336-12; T-C-1745-1-M; I-T-C-2336-8; I-T-C-81-046; I-T-C-81-292; I-T-C-82-087; I-T-C-83-011; I-T-C-83-108; I-T-C-84-056; I-T-C-88-018; I-T-C-88-181; I-T-C-89-104; I-T-C-90-019; I-T-C-033; I-T-C-90-069; I-T-C-90-108; I-T-C-90-179; I-T-C-91-136; I-T-C-93-062
U.S.S.R. (formerly)	I-T-C-88-209; I-T-C-91-087; I-T-C-91-019; I-T-C-91-057
Mid-East-Asia	
Bahrain	I-T-C-83-031; I-T-C-83-182; I-T-C-84-087
Bangladesh	I-T-C-90-092
India	I-T-C-82-049; I-T-C-83-182; I-T-C-86-128
Iraq	I-T-C-2462-16; I-T-C-85-118
Israel	I-T-C-88-185
Jordan	I-T-C-83-050
Kuwait	I-T-C-2462-24
Oman	I-T-C-84-092
Pakistan	I-T-C-82-249; I-T-C-83-182; I-T-C-86-128
Saudi Arabia	I-T-C-2462-40; I-T-C-83-044
Sri Lanka	I-T-C-84-042
Syria	I-T-C-85-058
United Arab Emirates	I-T-C-81-119
Africa	
Algeria	I-T-C-83-182; I-T-C-86-128; I-T-C-88-203
Angola	I-T-C-87-045; I-T-C-87-138
Cameroon	I-T-C-2826; I-T-C-82-035; I-T-C-82-044;
Egypt	I-T-C-81-121; I-T-C-84-120
Ethiopia	I-T-C-2831; I-T-C-85-118
Gabon	I-T-C-82-263
Ivory Coast	I-T-C-81-148; T-C-2336-2
Kenya	I-T-C-85-118; I-T-C-87-138
Liberia	I-T-C-84-093
Morocco	I-T-C-83-182; I-T-C-86-128
Niger	I-T-C-82-112
Nigeria	I-T-C-88-108
Senegal	I-T-C-86-131; I-T-C-2692; I-T-C-82-134;
South Africa	I-T-C-86-064
Tunisia	I-T-C-83-170
Zambia	I-T-C-83-082
Far East	
Australia	I-T-C-2588-2; I-T-C-82-009; I-T-C-83-141; I-T-C-84-010; I-T-C-85-219
Fiji	I-T-C-81-275
Hong Kong	I-T-C-2688; I-T-C-82-084; I-T-C-87-021
Indonesia	I-T-C-83-032; I-T-C-84-166; I-T-C-85-074
Japan	I-T-C-83-032; I-T-C-83-182; I-T-C-85-207; I-T-C-85-219; I-T-C-87-012; I-T-C-88-014; I-T-C-89-086; I-T-C-91-051; I-T-C-92-179
Korea	I-T-C-83-182; I-T-C-86-064; I-T-C-86-128
Malaysia	I-T-C-83-032; I-T-C-88-040
New Zealand	I-T-C-82-240; I-T-C-85-059
Papua-New Guinea	I-T-C-2958
Philippines	I-T-C-2588; I-T-C-82-230; I-T-C-87-020
Singapore	I-T-C-2787; I-T-C-82-059; I-T-C-84-133
Taiwan	I-T-C-82-070; I-T-C-83-182; I-T-C-86-128
Thailand	I-T-C-82-277; I-T-C-85-075; I-T-C-85-121
Latin America & Caribbean	
Argentina	I-T-C-2462-10; I-T-C-83-076; I-T-C-87-076
Ascension Islands	I-T-C-2462-14
Bahamas	T-C-1470-1
Barbados	I-T-C-82-146; I-T-C-84-114
Belize	I-T-C-2462-42
Bermuda	I-T-C-3038; I-T-C-83-119; I-T-C-83-196; I-T-C-87-018; I-T-C-92-018
Bolivia	I-T-C-2462-34
Brazil	T-C-2262; I-T-C-93-030
British Virgin Islands	I-T-C-92-106
Cayman Islands	I-T-C-3011; I-T-C-84-080
Chile	I-T-C-2462-29; I-T-C-85-118
Colombia	T-C-2462-1; I-T-C-91-207
Costa Rica	T-C-2462-5; I-T-C-2690; I-T-C-83-157; I-T-C-83-197; I-T-C-85-003
Cuba	C4-83-003-R
Dominican Republic	I-T-C-2732
Ecuador	T-C-2430-2
El Salvador	I-T-C-82-042
French Guiana	I-T-C-3067
Guatemala	T-C-2388; I-T-C-85-006
Guyana	I-T-C-2462-48
Haiti	I-T-C-89-167
Honduras	T-C-2459
Jamaica	T-C-1967
Netherlands Antilles	I-T-C-81-209
Nicaragua	T-C-2446
Panama	T-C-1947; I-T-C-82-028;
Paraguay	T-C-2462-44
Peru	I-T-C-2462-33
Puerto Rico	T-C-2497; I-T-C-92-106
Trinidad/Tobago	I-T-C-2462-26; I-T-C-85-214; I-T-C-93-030
Uruguay	I-T-C-2790
U.S. Virgin Islands	I-T-C-2668; I-T-C-92-106; I-T-C-93-029; I-T-C-93-030
Venezuela	T-C-2341-1; I-T-C-83-182; I-T-C-93-030
Pacific Rim	
Guam	I-T-C-92-179
Hawaii	I-T-C-90-081; I-T-C-92-179
Miscellaneous/ Worldwide	I-T-C-2878; I-T-C-2826; I-T-C-3073; I-T-C-2649-1; I-T-C-2700; I-T-C-2336-10; T-C-2358; I-T-C-81-172; I-T-C-81-244; I-T-C-81-313; I-T-C-3211; I-T-C-81-002; WPC 4805; I-T-C-83-183; I-T-C-84-003; I-T-C-84-180; I-T-C-85-078; I-T-C-86-112; I-T-C-88-003
Resale	I-T-C-88-127; I-T-C-88-151

TRT/FTC INTERNATIONAL, INC.

Countries	File Nos.
All Countries	I-T-C-88-082
Argentina	I-T-C-88-066
Australia	I-T-C-89-168
Bolivia	I-T-C-91-150
Canada	I-T-C-90-144
Chile	I-T-C-89-120
Colombia	I-T-C-88-169
Costa Rica	I-T-C-90-020
Denmark	I-T-C-89-149
Egypt	I-T-C-88-201
Ecuador	I-T-C-92-071
France	I-T-C-88-019
Germany	I-T-C-88-046
Guatemala	I-T-C-90-091
Honduras	I-T-C-90-020
Hong Kong	I-T-C-88-173
Japan	I-T-C-91-179
Mexico	I-T-C-90-180
Netherlands	I-T-C-88-104
Nicaragua	I-T-C-91-013
Peru	I-T-C-89-041
Portugal	I-T-C-86-162
Singapore	I-T-C-90-023
Korea	I-T-C-90-054
Switzerland	I-T-C-90-077
United Kingdom	I-T-C-85-117
Uruguay	I-T-C-93-015
Venezuela	I-T-C-88-065

ATTACHMENT B

TRT/FTC COMMUNICATIONS, INC.
TITLE II INTERNATIONAL EARTH STATION AUTHORIZATIONS

Call Sign	Location	File No.
KA-203	Carteret, New Jersey	CSG-87-029-M/L
KA-82	Niles Canyon, California	CSG-86-073-P/L
KA-93	Niles Canyon, California	CSG-86-073-P/L
KA-46	Carteret, New Jersey	CSG-87-016-AL
KA-92	Belleville, Illinois	CSG-86-072-P/L

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MARIGA COMMUNICATIONS CORPORATION — File No. I-T-C-93-147

For authority pursuant to Section 214 of the Communications Act of 1934, as amended, to establish channels of communication between the United States and the Russian Federation via the Ghorizont satellite system for the provision of private line service not interconnected with the public switched telephone network.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: July 26, 1993; Released: August 5, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of private line service by Mariga Communications Corporation (Mariga) between the U.S. and the Russian Federation, subject to the conditions set forth herein.[1]

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-147 IS GRANTED and Mariga is authorized to acquire up to two 1.544 Mbps (T-1) circuits over the Ghorizont satellite located at 14^0 W.L.[2] for the provision of private line service not interconnected with the public switched network between the U.S. and the Russian Federation.[3]

3. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

4. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic, required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

5. IT IS FURTHER ORDERED that the applicant shall file a separate Section 214 application for the use of any additional circuits over this separate satellite system.

6. IT IS FURTHER ORDERED that no material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between the applicant and its foreign correspondent in the Russian Federation. A copy of each of the agreements shall be filed with the Commission within 30 days of its execution and shall otherwise comply with the filing requirements contained in §43.51 of the Commission's Rules, 47 C.F.R. §43.51.

7. IT IS FURTHER ORDERED that neither the applicant nor any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the U.S., its territories or possessions, which is denied to any other U.S. carrier by reason of any concession, contract, understanding, or working arrangement to which the applicant or any persons or companies controlling it or controlled by it is a party.

8. IT IS FURTHER ORDERED Mariga is authorized to provide private line service authorized herein using existing earth stations in the U.S. authorized to communicate with the Intersputnik satellite system at 14^0 W.L. or future earth stations which may be so authorized. Should the applicant wish to construct its own earth station to provide these services, an appropriate application under Title III of the Communications Act will be required.

9. IT IS FURTHER ORDERED that the continued effectiveness of this authorization is conditioned on the outcome of the review after six months by the State Department and Commission as specified in paragraph 11 of the Commission's Order DA 91-621 (*see* 6 FCC Rcd 2932 (1991)). If the Commission is notified by the State Department that the continued use of the Ghorizont Satellite is no longer in the national interest, then this authorization will be subject to cancellation.

10. IT IS FURTHER ORDERED that the applicant shall submit a monthly report detailing the number and capacity of private line circuits in use over the Intersputnik system. The report shall also set forth the applicant's number and capacity of private line circuits in use over each communication system for the countries served by the Intersputnik system. These reports shall be filed no later than the 20th day of each month and shall include the required information for the previous month.

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[1] The State Department supports the authorization of private line service via the Intersputnik system. However, because of its concern that commercial satellite systems cannot effectively compete on the basis of price with non-commercial systems, the State Department has requested that such authorization be granted subject to review after six months by the Commission and the Executive Branch. *See* Letter from Ambassador Bradley P. Holmes, Department of State, to Chairman Alfred C. Sikes, Federal Communications Commission (November 21, 1990).

[2] The Ghorizont satellite located at 14^0 W.L. is part of the the Intersputnik satellite system.

[3] In a letter dated December 19, 1990, the State Department informed the Commission that U.S. obligations under the INTELSAT Agreement have been met. *See* Letter from Steven W. Lett, Deputy Director for Satellite and Cable Policy, Bureau of International Communications and Information Policy, Department of State, to George Li, Chief, International Facilities Division, Common Carrier Bureau, Federal Communications Commission (December 19, 1990).

11. IT IS FURTHER ORDERED that our authorization of Mariga to provide private lines is limited to the provision of such private lines only between the United States and the Russian Federation -- that is, private lines which originate in the United States and terminate in the Russian Federation or originate in the Russian Federation and terminate in the United States. In addition, Mariga may not -- and Mariga's tariffs must state that Mariga's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or the foreign end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that Russian administration affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), *Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending*.

12. This order is issued pursuant to Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of the public notice of this order (*see* Section 1.4 (b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MOBILE SATELLITE COMMUNICATIONS, INC. dba PITTSBURGH INTERNATIONAL TELEPORT — File No. I-T-C-93-149

Application for authority to acquire and operate facilities for service between the U.S. and Suriname.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: July 23, 1993; Released: August 5, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct private line service between the U.S. and Suriname by Mobile Satellite Communications, Inc. (MSC).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-149 IS GRANTED and MSC is authorized to:

a. lease from Comsat and operate one 512-kbps half-circuits between an appropriately licensed U.S. earth station and an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with a similar circuit between the satellite and an earth station in Suriname furnished by MSC's correspondent in Suriname;

b. lease and operate one 512-kbps half-circuits in the appropriately licensed U.S. earth station to be used in conjunction with the satellite space segment capacity;

c. lease and operate any necessary domestic connecting facilities; and

d. use said facilities to provide private line service not interconnected with the public switched network between the U.S. and Suriname.

3. IT IS FURTHER ORDERED that our authorization of MSC to provide private lines is limited to the provision of such private lines only between the United States and Suriname -- that is, private lines which originate in the United States and terminate in Suriname or which originate in Suriname and terminate in the United States. In addition, MSC may not -- and MSC's tariff must state that MSC's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international basic telecommunications service, including switched voice service, unless authorized to do so by the Commission upon a finding that the foreign administration affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), and *Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending*.

4. IT IS FURTHER ORDERED that neither MSC nor any persons or companies directly or indirectly controlling or controlled by MSC, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which MSC or any persons or companies controlling or controlled by MSC are parties.

5. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

7. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15 of the Commission's Rules, 47 C.F.R. Section 63.15 for any additional circuits acquired on the INTELSAT Satellite System.

8. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreement it enters into with its foreign correspondents with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

9. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MFS INTELENET, INC. File No. I-T-C-93-154

Application for Authority pursuant to Section 214 of the Communications Act of 1934, as amended, to Resell Services of Other Common Carriers to Provide Private Line Service between the United States and International Points.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: July 23, 1993; Released: August 5, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the resale of international private lines for the provision of international private line service to the general public by MFS Intelenet, Inc. (MFS).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-154 IS GRANTED and MFS is authorized to resell international private lines not interconnected to the public switched network for the provision of international private line service[1] between the United States and each of the international points,[2] as specified in the attached Appendix.

3. IT IS FURTHER ORDERED that MFS is authorized to lease and operate one-half interest in up to 50 voice-grade circuits between the U.S. and the U.K and 20 voice-grade circuits between the U.S. and every other point from authorized U.S. common carriers[3] for the provision of its authorized resale of international private lines for private line service, as specified in the attached Appendix.

4. IT IS FURTHER ORDERED that neither MFS nor any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions which is denied to any other United States carrier by reason of any concession contract, understanding, or working arrangement to which MFS or any such persons or companies controlling or controlled by MFS are parties.

5. IT IS FURTHER ORDERED that:

(a) MFS shall file publicly any contracts entered into with other carriers or a contract summary in accordance with Section 203 of the Communications Act, 47 U.S.C. §203, and the *Interexchange Order*;[4]

(b) the services obtained by MFS shall be made generally available to similarly situated customers at the same terms, conditions and rates; and

(c) MFS shall file tariff provisions pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61; for the services authorized in this Order.

6. IT IS FURTHER ORDERED that our authorization of MFS to provide private lines is limited to the provision of such private lines only between the United States and those foreign countries listed in the Appendix -- that is, private lines which originate in the United States and terminate in those foreign countries or originate in those foreign countries and terminate in the United States. In addition, MFS may not -- and MFS' tariffs must state that MFS' customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or the foreign end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that foreign administration affords resale opportunities equivalent to those available

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[1] The Commission has concluded that the public interest in cost-based international telecommunications services would be served by the encouragement of international resale, provided that steps were taken to ensure that such resale did not exacerbate the settlements deficit. The Commission, therefore, conditioned its resale policy by requiring U.S. carriers to permit resale of their international private lines only to those countries which afford equivalent resale opportunities. (*See Regulation of International Accounting Rates, CC Docket 90-337, Phase II First Report and Order*, 7 FCC Rcd 559 (1992)). Subsequently, the Commission stated that the resale of international private lines for the provision of international private line services, as opposed to switched services, does not implicate the settlements process to the extent such lines are used only to carry non-switched traffic that is not subject to the international settlements process, and thus clarified that the equivalency requirement does not apply to the resale of international private lines for private line services. Nonetheless, the Commission confirmed the right of an end user to interconnect its international private line to the PSN through, for example, its own PBX. (*See Regulation of International Accounting Rates, CC Docket 90-337, Phase II Order on Reconsideration and Third Further Notice of Proposed Rulemaking* (Phase II Third Further Notice), 7 FCC Rcd 7927 (1992).)

[2] *See* Appendix for list of authorized international points. We note that MFS should obtain any interest in facilities beyond the authorized international points for the purpose of providing common carrier services, including private line service, between the U.S. and other international points, such action would constitute an extension of line under Section 214 of the Act. Therefore, under the provisions of the Commission's *International Competitive Carrier Policies*, 102 FCC 2d 812 (1985), *recon. denied* 60 R.R. 2d 1435 (1986), it would be necessary for MFS to file additional applications for a certificate of public convenience and necessity under Section 214 to begin service to each additional country and for authority to acquire any facilities needed to provide service to such additional points.

[3] Initially, MFS intends to resell the services of AT&T, MCI and Sprint.

[4] *See Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd 5880, 5902 (1991)(*Interexchange Order*).

under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), *Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending*.

7. IT IS FURTHER ORDERED that MFS shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that MFS shall file a copy of any operating agreements entered into with foreign correspondents with the Commission within 30 days of its execution.

9. IT IS FURTHER ORDERED that MFS shall file semi-annual circuit addition reports pursuant to Section 63.15 of the Commission's Rules, 47 C.F.R. §63.15.

10. IT IS FURTHER ORDERED that this Order may be subject to future modification pursuant to the outcome of the *Phase II Third Further Notice* and any related proceedings.

11. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services MFS seeks authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

12. This Order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the public notice of this Order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX

Country	No. of Voice-grade Circuits
Argentina	20
Austria	20
Australia	20
Bahamas	20
Belgium	20
Bermuda	20
Brazil	20
Canada	20
Chile	20
China, People's Rupublic	20
Commonwealth of Indepent States (including the countries formerly comprising the Union of Soviet Socialist Republics)	
Denmark	20
Egypt	20
Ecuador	20
France	20
Germany	20
Ghana	20
Greece	20
Hong Kong	20
India	20
Indonesia	20
Ireland	20
Israel	20
Italy	20
Japan	20
Kenya	20
Korea	20
Liechtenstein	20
Mexico	20
Netherlands	20
New Zealand	20
Norway	20
Panama	20
Peru	20
Philippines	20
Poland	20
Portugal	20
Romania	20
Saudi Arabia	20
Singapore	20
South Africa	20
Spain	20
Sweden	20
Switzerland	20
Thailand	20
Taiwan	20
United Kingdom	50
Venezuela	20
Yugoslavia	20
Zaire	20

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE HAWAIIAN TELEPHONE CO[illegible]IPANY INC. File No. I-T-C-93-158

Application for authority to acquire and operate facilities for direct service between Hawaii and France.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: July 27, 1993; Released: August 5, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between Hawaii and France by GTE Hawaiian Telephone Company, Inc. (HTC).

2. Accordingly, IT IS ORDERED that Application File No. I-T-C-93-158 IS GRANTED, and HTC is authorized to:

a. activate and operate a one-half interest in one 2.048 Mbps circuit (one MIU)[1] in the TAT-11 cable;

b. lease and operate domestic connecting facilities between San Luis Obispo, California and Manahawkin, New Jersey; and

c. use said facilities in conjunction with previously authorized facilities in the HAW-5 cable and facilities furnished by its correspondent in France, to provide HTC's regularly authorized services between Hawaii and France.

3. IT IS FURTHER ORDERED that our authorization of HTC to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and France -- that is, private lines which originate in the United States and terminate in France or which originate in France and terminate in the United States. In addition, HTC may not -- and HTC's tariff must state that HTC's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or France end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that France affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), *Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd 7927 (1992), *petitions for reconsideration pending*.

4. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] A MIU (Minimum Investment Unit) allows effective use of a 2.048 mbps digital bit stream and the additional 162,539.68 bits per second required for multiplexing in each direction.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY — File No. I-T-C-93-163

For authority pursuant to Section 214 of the Communications Act of 1934, as amended, to convey half-interests on an IRU basis, in the TAT-10 Cable System

ORDER AND AUTHORIZATION

Adopted: July 26, 1993; Released: August 5, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that present and future public convenience require its grant.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-163 IS GRANTED and AT&T is authorized to convey on an Indefeasible Right of User (IRU) basis, half-interests in two Minimum Investment Units (MIUs)[1] in Segment B (Green Hill, Rhode Island to Norden, Germany) and an equivalent IRU interest in Subsegment C1 (cable station located in Norden, Germany) of the TAT-10 Cable System and associated channel translating equipment to its correspondents in the Czech and Slovak Republics, Sprava Post a Telekomunikacie Telecom (SPT-Telecom) and Slovenske Telekomunikacie, s.p. Bratislava (SPT Bratislava).

3. This order is issued pursuant to Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] A MIU is a 2.048 Megabit per second (Mbit/s) digital stream.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — File No. I-T-C-93-165

Application for Authorization Under Section 214 of the Communications Act of 1934, as Amended, to Acquire and Operate Additional Capacity in the MAT-2 Cable System for the Provision of AT&T's Authorized Services between Points in or Reached via the United States and Israel, Italy and Turkey

ORDER AND AUTHORIZATION

Adopted: July 20, 1993; **Released: August 5, 1993**

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed by American Telephone and Telegraph Company (AT&T)[1] pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS ORDERED that application File No. I-T-C-93-165 IS GRANTED and AT&T is authorized to:

a. acquire and operate additional half-interests in 308 jointly-assigned Minimum Assignable Units of Ownership (MAUOs)[2] of capacity in the MAT-2 cable system[3] to extend capacity to Israel (270 MAUOs), Italy (18 MAUOs) and Turkey (20 MAUOs);

b. lease appropriate extension facilities; and

c. activate capacity in the MAT-2 cable system and the aforementioned extension facilities for the provision of its authorized telecommunications services to its certificated points.

2. IT IS FURTHER ORDERED that our authorization of AT&T to provide private lines is limited to the provision of such private lines only between the United States and its certificated points, that is, private lines which originate in the United States and terminate in certificated points or which originate in certificated points and terminate in the United States. In addition, AT&T may not -- and AT&T's tariff must state that AT&T's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international basic communications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the foreign administration affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), *Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending*.

3. This order is issued pursuant to Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

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[1] AT&T's wholly-owned subsidiary, Transpacific Communications, Inc., will own the additional capacity acquired in the MAT-2 Cable System on behalf of AT&T.

[2] A MAUO is defined as the minimum practical unit of ownership allowing the use of 72,533.333 bits per second in each direction consisting of 64,000 usable bits per second and an additional 8,533.333 bits per second for multiplexing each of the 1920 such MAUOs which constitute a Basic System Module.

[3] The MAT-2 Cable System, co-owned by twenty-two parties including AT&T and two other U.S. carriers, is a digital fiber optic submarine cable which extends between and among Estepona, Spain; Mallorca, Spain; and Palermo, Italy. The cable links with the TAT-9 cable system in Spain and the EMOS-1 cable system in Italy. AT&T will pay approximately $3.4 million for its additional capacity.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — File No. I-T-C-93-170

Application for Authorization Under Section 214 of the Communications Act of 1934, as Amended, to Acquire and Operate Capacity in a Digital Submarine Cable System Between Singapore, Malaysia, Hong Kong, Taiwan and Japan

ORDER AND AUTHORIZATION

Adopted: July 7, 1993; **Released: August 5, 1993**

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed by American Telephone and Telegraph Company (AT&T)[1] pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require its grant.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-170 IS GRANTED and AT&T is authorized to:

a. acquire and operate half-interests in 5 jointly-assigned Minimum Investment Units (MIUs)[2] of capacity in the Singapore-Hong Kong link of the APC system;[3]

b. acquire, on an ownership basis, and operate half-interests in 17 jointly-assigned MIUs in the Singapore-Kyushu link of the APC system;

c. acquire, on an ownership basis, and operate half-interests in 5 jointly-assigned MIUs in the Kuantan-Toucheng link of the APC system;

d. acquire, on an ownership basis, and operate 16 jointly-assigned MIUs in the Hong Kong-Miura link of the APC system;

e. acquire, on an ownership basis, and operate 36 jointly-assigned MIUs in the Toucheng-Kyushu link of the APC system;

f. acquire, on an Indefeasible Right of User basis, and operate 3 jointly-assigned MIUs in the Kyushu-Miura link of the APC system;

g. lease appropriate extension facilities; and

h. activate the aforementioned capacity and extension facilities for the provision of its authorized telecommunications services to its certificated points served by the APC system.

3. IT IS FURTHER ORDERED that our authorization of AT&T to provide private lines is limited to the provision of such private lines only between the United States and its certificated points, that is, private lines which originate in the United States and terminate in certificated points or which originate in certificated points and terminate in the United States. In addition, AT&T may not -- and AT&T's tariff must state that AT&T's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international basic communications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the foreign administration affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), *Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending.*

4. This order is issued pursuant to Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] AT&T's wholly-owned subsidiary, Transpacific Communications, Inc., will own portions of the Asia Pacific Cable (APC) system on behalf of AT&T.

[2] A MIU as defined in the APC Construction and Maintenance Agreement allows effective use of 2.048 Mbit/s digital bit stream and the additional 162,539.68 bits per second required for multiplexing in each direction.

[3] The APC system, co-owned by forty-three parties including AT&T and five other U.S. carriers, extends between Katong, Singapore; Cherating, Kuantan, Malaysia; Cape D Aguilar, Hong Kong; Toucheng, Taiwan; Miyazaki, Kyushu, Japan; and Miura, Japan. The APC system is estimated to have a total cost of $310 million. As a party to the Construction and Maintenance Agreement, AT&T's current percentage ownership interest in the APC cable system is 3.4364%. With an ownership percentage of 3.4364%, AT&T's initial share of the capital cost is $10.6 million plus interest during construction.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PACIFIC GATEWAY EXCHANGE, INC. File No. I-T-C-93-171

Application for Authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate facilities for the provision of common carrier services between the United States and various international points

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: July 7, 1993; Released: August 5, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of the requested services.[1]

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-171 IS GRANTED and Pacific Gateway Exchange, Inc. (PGE) is authorized to:

a. lease from Comsat and operate 64-kbps satellite half-circuits, allocated in accordance with Appendix A, between appropriately-licensed earth stations in the United States and appropriate Atlantic Ocean Region (AOR) and Pacific Ocean Region (POR) INTELSAT satellites, connecting with similar circuits between the satellite and an earth station in each of the points listed in Appendix A furnished by PGE's correspondent in that point;

b. lease and operate 64-kbps circuits, allocated in accordance with Appendix A, in an appropriately-licensed earth station in the United States;

c. lease and operate appropriate connecting facilities between the earth station in (b) and PGE's operating center in Los Angeles, California;

d. use said facilities to provide international private line and switched voice services between the United States and those points listed in Appendix A;

e. acquire, on an Indefeasible Right of User (IRU) basis, a one-half interest in and operate 30 64-kbps circuits in the TAT-9 cable system between the cable station in Manahawkin, New Jersey and the TAT-9 cable station in Goonhilly, United Kingdom for the provision of international private line and switched voice services between the United States and the United Kingdom;

f. acquire, on an Indefeasible Right of User (IRU) basis, a one-half interest in and operate 30 64-kbps circuits in the TAT-9 cable system between the cable station in Manahawkin, New Jersey and the TAT-9 cable station in St. Hilaire, France for the provision of international private line and switched voice services between the United States and France;

g. acquire, on an IRU basis, a one-half interest in and operate 30 64-Kbps circuits in the TAT-10 cable system between the cable station in Greenhill, Rhode Island and the TAT-10 cable station in Norden, Germany for the provision of international private line and switched voice services between the United States and Germany;

h. lease and operate circuits in any necessary domestic facilities between PGE's operating center in Los Angeles, California, on the one hand, and the U.S. cable stations in (e), (f) and (g), respectively, on the other hand.

3. IT IS FURTHER ORDERED that our authorization of the applicant to provide private lines is limited to the provision of such private lines only between the United States and those points listed in Appendix 1 -- that is, private lines which originate in the United States and terminate in one of the points listed in Appendix 1, or which originate in one of the points listed in Appendix 1 and terminate in the United States. In addition, the applicant may not -- and the applicant's tariff must state that the applicant's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international basic communications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the foreign administration affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), *Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending.*

[1] We note that should PGE obtain any interest in facilities beyond the respective cable landing countries for the purpose of providing common carrier services, including private line service, between the U.S. and other foreign points, such action would constitute an extension of line under Section 214 of the Act. Therefore, under the provisions of the Commission's International Competitive Carrier decision, *International Competitive Carrier Policies*, 102 FCC 2d 812 (1985), *recon. denied*, 60 R.R. 2d 1435 (1986), it would be necessary for PGE to file additional applications for a certificate of public convenience and necessity under Section 214 to begin service to each additional country and for authority to acquire any facilities needed to provide service to such additional points.

4. IT IS FURTHER ORDERED that neither applicant nor any persons or companies directly or indirectly controlling or controlled by applicant, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which applicant or any persons or companies controlling or controlled by applicant are parties.

5. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this order.

6. IT IS FURTHER ORDERED that the applicant shall file with the Commission copies of any operating agreements it enters into with its foreign correspondents within 30 days of their execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

7. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit addition reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b).

8. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

9. IT IS FURTHER ORDERED that the continued effectiveness of this authorization with respect to Vietnam is contingent upon the applicants' compliance with applicable Treasury Department Regulations regarding service to Vietnam (*See* Department of the Treasury, Office of Foreign Assets Control Regulations, 31 C.F.R. §500.571, effective April 23, 1992).

10. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

11. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX A

Atlantic Ocean Region Satellite

Country	Initial Circuits Satellite (64-kbps)	Earth Station (64-kbps)	Country	Initial Circuits Satellite (64-kbps)	Earth Station (64-kbps)
Argentina	12	12	Austria	6	6
Bahamas	12	12	Belgium	12	12
Brazil	30	30	Chile	6	6
Colombia	30	30	Costa Rica	12	12
Denmark	6	6	Dom. Rep.	30	30
Ecuador	12	12	Egypt	12	12
El Salvador	12	12	France	30	30
Germany	30	30	Greece	12	12
Guatemala	12	12	Haiti	12	12
Honduras	12	12	Iran	6	6
Ireland	12	12	Israel	30	30
Italy	30	30	Jamaica	12	12
Jordan	6	6	Netherlands	12	12
Nicaragua	6	6	Norway	6	6
Pakistan	12	12	Panama	12	12
Peru	12	12	Poland	12	12
Portugal	6	6	S. Arabia	30	30
S. Africa	6	6	Spain	12	12
Sweden	12	12	Switz.	12	12
Trinidad	12	12	U.K.	30	30
Venezuela	12	12			

Pacific Ocean Region Satellite

Country	Initial Circuits Satellite (64-kbps)	Earth Station (64-kbps)
Cambodia	6	6
China	12	12
India	12	12
Indonesia	6	6
Malaysia	6	6
Thailand	12	12
Vietnam	6	6

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Sprint Communications Company L.P. — File No. I-T-C-93-173

Application for Authority to Acquire and Operate Facilities for Service Between the United States and Pakistan

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: July 2, 1993; Released: August 5, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the United States and Pakistan by Sprint Communications Co., L.P. (Sprint).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-173 IS GRANTED and Sprint is authorized to:

a. acquire by lease from the United Arab Emirates (UAE) half-interests in 45 circuits on the UAE/Karachi Cable matching with facilities furnished by Sprint's correspondent in Islamabad, Pakistan (Pakistan Telecom);

b. connect these cable circuits to the existing 2 megabit (Mb) International Digital Route facility currently operating between Sprint's Beeline earth station and the UAE on the Atlantic Ocean Region (AOR) satellite located at 342 degrees East Longitude;[1]

c. utilize Sprint's own facilities to connect the Beeline earth station and Sprint's operating center in New York;

d. utilize the facilities described above to furnish all of Sprint's authorized services, including switched voice service, between the United States and Pakistan.[2]

3. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreement it enters into with its foreign correspondent in Pakistan with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. § 43.51.

4. IT IS FURTHER ORDERED that our authorization for Sprint to provide private lines is limited to the provision of such private lines only between the United States and Pakistan -- that is, private lines which originate in the United States and terminate in Pakistan or which originate in Pakistan and terminate in the United States. In addition, Sprint may not -- and Sprint's tariff must state that Sprint's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international basic communications services, including switched services, unless authorized to do so by the Commission upon a finding that its correspondents afford resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), *Order on Reconsideration and Third Further NPRM*, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending*.

5. IT IS FURTHER ORDERED that neither Sprint nor any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which Sprint or any persons or companies controlling or controlled by Sprint are parties.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. Section 63.15(b).

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[1] This authorization is conditioned on Pakistan Telecom being responsible for the 2 Mb of space segment capacity between the satellite and the UAE earth station.

[2] In its application Sprint requests authority to acquire and operate facilities for the provision of common carrier services between the United States and Pakistan and points beyond. We note that should Sprint obtain any interest in facilities beyond Pakistan for the purpose of providing common carrier services, including private line service, between the United States and other foreign points, such action would constitute an extension of line under Section 214 of the Act. Therefore, under the provisions of the Commission's International Competitive Carrier decision, *International Competitive Carrier Polices*, 102 FCC 2d 812 (1985), *recon. denied* 50 R.R. 2d 1435 (1986), it would be necessary for Sprint to file additional applications for a certificate of public convenience and necessity under Section 214 to begin service to each additional country and for authority to acquire any facilities needed to provide service to such additional points.

9. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of
Penfold Communications, Inc.

Licensee of Noncommercial
Radio Station KRTM(FM),
Temecula, California,

for a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: July 23, 1993; Released: August 6, 1993

By the Chief, Mass Media Bureau:

1. The Commission, by the Chief of the Mass Media Bureau acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, has under consideration (1) a $5,000 Notice of Apparent Liability (NAL) issued December 31, 1992,[1] to Penfold Communications, Inc., licensee of Noncommercial Radio Station KRTM(FM), Temecula, CA, and (2) the licensee's response to the NAL dated January 28, 1993, and supplement to response dated June 16, 1993, asking that the forfeiture be reduced or rescinded.

2. The NAL was issued for repeated violations of Section 399B of the Communications Act of 1934, as amended, which prohibits noncommercial stations such as KRTM from broadcasting advertisements. 47 U.S.C. § 399b. *See also* 47 C.F.R. § 73.503. In response, the licensee states that the violations were unintentional, and that it has taken measures to prevent further violations. Neither of these is a reason to reduce a forfeiture.[2] Similarly, the letters and petitions signed by KRTM listeners expressing their support for the station and their opposition to the fine do not address the legal issues before us and cannot serve as a basis for a fine reduction or rescission in a case like this.

3. In addition, the licensee claims financial hardship, as evidenced by its balance sheet and income statement for 1992. It also argues for a reduction based on its past history of compliance. Having found a credible showing of financial hardship, along with no past history of violations, we are inclined to reduce the forfeiture amount accordingly.

4. Following the guidelines described in our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *on recon.*, 7 FCC Rcd 5339 (1992), *pet. for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992), we reduce the $5,000 forfeiture to $3,500. The licensee is cautioned, however, that we expect full compliance with our underwriting rules and policies and will not hesitate to impose a more substantial forfeiture in the future for additional or subsequent similar violations.[3]

5. Accordingly, we grant the licensee's request for a reduced forfeiture. Pursuant to Section 503(b) of the Communications Act of 1934, as amended, IT IS ORDERED, that Penfold Communications, Inc., licensee of Radio Station KRTM(FM), Temecula, CA, FORFEIT to the United States the sum of Three Thousand Five Hundred Dollars ($3,500) for repeated violations of 47 U.S.C. § 399b. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument payable to the Federal Communications Commission. In regard to this forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this Memorandum Opinion and Order. Any request for delayed payments or payments in installments will be considered as a separate matter in accordance with Section 1.1914 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] *See Penfold Communications, Inc.*, 8 FCC Rcd 78 (MMB 1992).

[2] *See High Fidelity Broadcasters, Inc.*, 30 FCC 2d 783 [22 RR 2d 471] (1971). *See also Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *on recon.*, 7 FCC Rcd 5339 (1992), *pet. for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992). These forfeiture guidelines reflect the longstanding Commission policy that an intentional violation may justify upward adjustment of a forfeiture amount, but an unintentional violation does not justify a downward adjustment.

[3] Note that we continue to receive complaints indicating that KRTM(FM)'s underwriting announcements contain calls to action ("See Circus Vargas," broadcast March 27, 1993), qualitative terms (Sizzler's "friendly and efficient service," broadcast May 31, 1993), and price information and/or inducements to patronize (mentions of restaurant happy hours and automotive warranties).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Rochester Telephone Corporation, Mid-South Telecommunications Company, Inc. and S & A Telephone Company, Inc.

Joint Petition for Waivers of Sections 61.41(c), 61.41(d) and 69.3(e)(11) of the Commission's Rules and Regulations

ORDER

Adopted: July 22, 1993; Released: July 23, 1993

By the Acting Chief, Common Carrier Bureau:

1. On March 10, 1993, Rochester Telephone Corporation (Rochester), Mid-South Telecommunications Company, Inc. (Mid-South) and S & A Telephone Company (S&A) (petitioners) filed a joint petition for waivers of Sections 61.41(c), 61.41(d) and 69.3(e)(11) of the Commission's rules[1] to enable the sale of S&A by Rochester to Mid-South. No comments regarding the petition were filed. For the reasons discussed below, we grant the waivers to the extent indicated.[2]

2. Petitioners state that S&A is currently one of Rochester's exchange carrier subsidiaries serving approximately 800 access lines in Allen and Scranton, Kansas. They further state that Rochester, a price cap carrier, acquired S&A on July 12, 1990. At the time of the acquisition, S&A was a rate of return company that participated in the traffic sensitive and common line pools administered by the National Exchange Carrier Association (NECA).[3] As required by the Commission's "all-or-nothing" rule,[4] S&A withdrew from the NECA pools and became subject to price cap regulation.[5] According to petitioners, on February 19, 1993, Rochester and Mid-South entered into an agreement pursuant to which Mid-South will acquire all of the issued and outstanding shares of S&A from Rochester.[6] Petitioners request waivers of Sections 61.41(c) and (d) of the rules to permit S&A to withdraw from price cap regulation and a waiver of Section 69.3(c)(11) to permit S&A to participate in the NECA pools.[7]

3. The Commission's rules governing mergers and acquisitions provide that when a rate of return company and a price cap company merge, or when one company acquires the other, the resulting company must comply with price cap regulation within a year of the transaction.[8] The rationale for this rule is stated in the *LEC Price Cap Reconsideration Order*. First, in the absence of the rule, a company might attempt to shift costs from its price cap affiliate to its rate of return affiliate, allowing the rate of return affiliate to earn more (because of its greater revenue requirement) while generating greater earnings for the price cap affiliate without triggering the sharing mechanism. Second, if a LEC were allowed to alternate between rate of return regulation and price cap regulation, it could "game the system" by building up a large rate base under rate of return regulation, then opting for price caps again and cutting its costs to a more efficient level.[9] The Commission stated, however, that "in some cases, the efficiencies created by the purchase and sale of one or two exchanges may outweigh the threat of gaming the system. Such cases might justify a narrow waiver of the all-or-nothing rule."[10]

4. Petitioners argue that grant of the requested waivers and the sale of S&A will serve the economic interests of S&A, which cannot, with only 800 access lines in the state, realize sufficient economies of scope and scale to provide adequate telecommunications services to these subscribers. They further assert that the transaction will provide Mid-South an opportunity to apply its expertise in local exchange operations[11] and the waivers will best serve the interests of S&A subscribers by avoiding administrative and financial burdens of filing stand alone price cap tariffs.[12] Petitioners contend that the Commission, in making price caps mandatory only for the largest local exchange carriers, recognized that price cap regulation may not be appropriate for smaller carriers.[13] Finally, petitioners argue that permitting S&A to return to the NECA pools will not present an opportunity either to "game" the system or to shift costs between price cap and non-price cap companies, because Rochester will remain under price cap regulation, and S&A will not be affiliated with any other exchange carrier.[14]

5. We conclude that there is good cause to grant petitioners a waiver of Section 61.41(c) and 61.41(d) of the Commission's rules. The first concern identified by the Commission in adopting these rules -- cost-shifting between affiliates -- is not at issue here. Neither Mid-South nor

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[1] 47 C.F.R. §§ 61.41(c), 61.41(d) and 69.3(e)(11).

[2] In its petition, Rochester also sought waiver of Section 69.3(i)(4) of the Commission's rules, which it erroneously referred to as Section 69.4(i)(4). As discussed below a waiver of Section 69.3(i)(4) is not necessary.

[3] Joint Petition at 2.

[4] 47 C.F.R. 61.41(b).

[5] Joint Petition at 2.

[6] *Id.* at 3.

[7] *Id.* at 3-4.

[8] Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, 5 FCC Rcd 6786, 6821 (1990) and Erratum, 5 FCC Rcd 7664 (1990), *modified on recon.*, 6 FCC Rcd 2637 (1991)(*LEC Price Cap Reconsideration Order*).

[9] *See LEC Price Cap Reconsideration Order*, 6 FCC Rcd 2637, 2706.

[10] *Id.* at n.207.

[11] Mid-South left the local exchange business in 1990, and now seeks to reenter by purchasing S&A.

[12] Joint Petition at 4.

[13] *Id.* at 5, *citing* Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, 5 FCC Rcd 6786, 6818-19 (1990) and Erratum, 5 FCC Rcd 7664 (1990), *modified on recon.*, 6 FCC Rcd 2637 (1991).

[14] *Id.* at 9-10, *citing* US West Communications, Inc. and Emery County Farmers' Union Telephone Association Petition for Waiver of Sections 61.41(c) and 69.3(e)(11) of the Commission's Rules, 7 FCC Rcd 6076 (Com. Car. Bur. 1992).

Rochester is seeking to maintain separate affiliates under different systems of regulation. The second concern underlying the rules -- allowing a company to use mergers and acquisitions as a means of "gaming the system" -- is also not raised in this case. Except for the exchange it has contracted to sell to Mid-South, Rochester remains regulated under price caps; it retains no ability to bring this single exchange back under price caps.

6. Further, the Commission has always been sensitive to the administrative burdens imposed on small carriers by the application of Commission rules.[15] In the *LEC Price Cap Order*, the Commission recognized that small telephone companies should not be forced into a regulatory regime that was designed largely on the basis of historical performance by the largest local exchange carriers.[16] The Commission therefore made price cap regulation optional for smaller carriers. Given the Commission's reservations about mandatory application of the price cap plan to carriers other than GTE and the Regional Bell Operating Companies, our application of the all-or-nothing rule must take into account the Commission's concerns about applying the price cap system to small carriers.

7. We therefore grant a waiver of the all-or-nothing rule. Our waiver of Section 61.41 (c) and (d) allows S&A to become subject to rate of return regulation. Because S&A does not serve more than 50,000 access lines, it does not require a waiver of Section 69.3 to re-enter the NECA pools.[17]

ORDERING CLAUSES

8. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §4(i), and Section 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§0.91, 0.291, that the Joint Petition of Rochester Telephone Corporation, Mid-South Telecommunications Company, Inc., and S & A Telephone Company, Inc. for waiver of Section 61.41(c) of the Commission's Rules, 47 C.F.R. §61.41(c), IS GRANTED.

9. IT IS FURTHER ORDERED that the Joint Petition of Rochester Telephone Corporation, Mid-South Telecommunications Company, Inc., and S & A Telephone Company, Inc. for waiver of Section 69.3(e)(11) of the Commission's Rules, 47 C.F.R. §69.(e)(11), IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief
Common Carrier Bureau

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[15] *See, e.g.*,, Regulatory Reform for Local Exchange Carriers Subject to Rate of Return Regulation, Report and Order, CC Docket No. 92-135, FCC No. 93-253, (released June 11, 1993); and Regulation of Small Telephone Companies, CC Docket No. 86-467, Notice of Proposed Rulemaking, 2 FCC Rcd 1010 (1986); Report and Order, 2 FCC Rcd 3811 (1987); Order on Reconsideration, 3 FCC Rcd 5770 (1988).

[16] Second Report and Order, 5 FCC Rcd 6786, 6826-27 (1990) and Erratum, 5 FCC Rcd 7664 (1990) (*LEC Price Cap Order*), *modified on recon.* 6 FCC Rcd 2637 (1991), *petitions for further recon. dismissed*, 6 FCC Rcd 7482 (1991), *aff'd,National Rural Telecom Association v. FCC*, Nos. 91-1300, 91-1303, 91-1304 and 91-1326, slip op. (D.C. Cir. Mar. 26, 1993).

[17] *See* 47 C.F.R. § 69.3(g)(2).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-106

In the Matter of

Amendment of Part 74 of the
Commission's Rules Governing
Use of the Frequencies in
the Instructional Television
Fixed Service

ORDER

Adopted: July 28, 1993; Released: July 28, 1993

Reply Comment Date: August 19, 1993

By the Chief, Mass Media Bureau

1. This action extends the deadline for filing reply comments in response to the *Notice of Proposed Rule Making* in MM Docket No. 93-106, in which the Commission sought comment on the proposed use of "channel loading," whereby Instructional Television Fixed Service (ITFS) licensees authorized to operate multiple channels may shift the per-channel minimum ITFS program requirements onto fewer than four channels. The deadline for acceptance of reply comments was July 29, 1993.

2. The Wireless Cable Association International, Inc. (WCA) requests a 21-day extension of the reply comment period, until August 19, 1993, to provide additional time for WCA and educational entities to attend WCA's annual convention in Orlando, Florida on August 2, 1993. Several entities which filed initial comments in this proceeding, according to WCA, have agreed to participate in the conference to discuss a possible compromise regarding the proposal.

3. In view of the foregoing, the Bureau finds that good cause exists for an extension. Pursuant to Section 0.283 of the Commission's Rules, 47 C.F.R. §0.283, the deadline for filing reply comments in this proceeding is extended to August 19, 1993.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI Telecommunications
Corporation
Tariff F.C.C. No. 1 Transmittal Nos. 722 and 723

ORDER

Adopted: July 29, 1993; Released: July 29, 1993

By the Chief, Tariff Division, Common Carrier Bureau:

1. On July 16, 1993, MCI Telecommunications Corporation (MCI) filed Transmittal No. 722, and, on July 19, 1993, Transmittal No. 723, on fourteen days' notice, pursuant to Section 61.58(b) of the Commission's Rules, 47 C.F.R. § 61.58(b). These filings are *prima facie* lawful. *See* Section 1.773(a)(1)(ii) of the Rules, 47 C.F.R. § 1.773(a)(1)(ii). The transmittals revise Appendix A - Special Customer Arrangement Options. Transmittals 722 and 723 are scheduled to become effective on July 30 and August 2, 1993, respectively.

2. On July 22, 1993, AT&T Communications (AT&T) filed a petition to reject Transmittal Nos. 722 and 723. MCI replied on July 26, 1993.

3. The Common Carrier Bureau has reviewed MCI Telecommunications Corporation Transmittal Nos. 722 and 723 and AT&T's petition. We conclude that these filings do not warrant rejection because they do not, on their face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petition to reject MCI Telecommunications Corporation Tariff F.C.C. No. 1, Transmittal Nos. 722 and 723, filed by AT&T Communications IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Moosey Communications, Inc.
(Assignor)

and File No. BALH-920918HX

Buck Owens
Production Company, Inc.
(Assignee)

For Assignment of License of
KTIE(FM), Bakersfield, California

MEMORANDUM OPINION AND ORDER

Adopted: July 27, 1993; Released: August 6, 1993

By the Commission:

1. The Commission has before it the above-captioned application for assignment of license of KTIE(FM), Bakersfield, California, from Moosey Communications, Inc. ("Moosey") to Buck Owens Production Company, Inc. ("Owens"), and a related request for waiver of 47 C.F.R. § 73.3555(c), the Commission's one-to-a-market rule.[1] The application is unopposed.

2. Owens is currently the licensee of KCWR(AM), KUZZ-FM, and KUZZ-TV, all licensed to Bakersfield, California. UHF station KUZZ-TV was acquired in 1990 pursuant to a grant of a "failed station" waiver of the Commission's one-to-a-market rule, 47 C.F.R. § 73.3555(c), note 7. *Dorothy J. Owens (KDOB-TV)*, 5 FCC Rcd 6615 (1990). By the instant application, Owens seeks to acquire a second FM station in this market. Owens contends that its acquisition of a second FM station in the market complies with the Commission's recently revised radio ownership rules.[2] It thus maintains that the acquisition of a second FM station is consistent with the common television-radio ownership already permitted for Owens by the grant of the "failed station" waiver in 1990 for the acquisition of the UHF television station. It concludes that a waiver of the one-to-a-market rule for its proposed purchase of KTIE could be granted on this basis alone. Alternatively, Owens submits a specific factual showing to support its waiver request.

3. We disagree with Owens' contention that our 1990 waiver grant makes any further waiver showing unnecessary. The 1990 waiver did not address additional acquisitions and did not consider the impact of the ownership of a second same service radio station by the licensee of a UHF TV/AM/FM combination in this market. The previous waiver request was necessary because Owens proposed the common ownership of an AM station, an FM station, and a television station in the same market, in violation of 47 C.F.R. § 73.3555(c). Owens, the current licensee of KCWR, KUZZ-FM, and KUZZ-TV, now proposes to acquire KTIE(FM), the relevant contour of which encompasses Bakersfield, the city of license of Owens' television station, KUZZ-TV. Thus, grant of the subject assignment application would create a new radio-television combination that violates the one-to-a-market rule and that clearly was not before the Commission when the 1990 waiver was granted. Further, in the proceeding revising the radio ownership rules, we noted that possible revisions to the one-to-a-market prohibition, including the impact of the revised radio ownership limits, were being addressed in the outstanding television ownership proceeding.[3] The Commission indicated that, until the one-to-a-market issue is resolved, it would consider waiver requests using the case-by-case waiver approach. *Radio Rules*, 7 FCC Rcd 6387, 6394 at n.40. Accordingly, consideration of a request for waiver of the rule in connection with the proposed assignment application is necessary under the case-by-case standard.

4. The case-by-case standard is outlined in the *Second Report and Order* in MM Docket No. 87-7 (*"Second Report and Order"*), 4 FCC Rcd 1741 (1989), *recon. denied in part and granted in part*, (*"Second Report and Order Recon."*), 4 FCC Rcd 6489 (1989). Under this standard, the Commission makes a public interest determination based upon the following criteria: (1) the potential public service benefits of joint operation of the facilities; (2) the types of facilities involved; (3) the number of media outlets owned by the applicant in the relevant market; (4) the financial difficulties of the stations involved; and (5) the nature of the relevant market in light of the level of competition and diversity after the joint operation is implemented.

5. In support of its request, Owens submits a showing which addresses each of the five case-by-case factors. First, regarding the potential public service benefits of joint operation, Owens contends that significant cost savings, economies of scale, and programming service benefits will be realized. Owens estimates that combining the operations of KTIE with those of KCWR, KUZZ-FM, and KUZZ-TV

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[1] Section 73.3555(c) of the Commission's Rules prohibits the common ownership of radio and television stations in the same market if the 2 mV/m contour of an AM station or the 1 mV/m contour of an FM station encompasses the entire community of license of a television station or, conversely, if the Grade A contour of a television station encompasses the entire community of license of an AM or FM station.

[2] In the proceeding establishing the limits on radio ownership, which became effective September 16, 1992, the Commission determined that a single entity would be allowed to own up to two AM and two FM broadcast stations in a single market if there are 15 or more stations in that market and the proposed combination does not lead to "excessive concentration in the market." Excessive concentration will be presumed where the stations to be jointly owned have a combined audience share exceeding 25 percent. *In re Revision of Radio Rules and Policies*, 7 FCC Rcd 2755 (1992), *recon. granted in part and denied in part* (*"Radio Rules"*), 7 FCC Rcd 6387 (1992). Since a single entity may own such a combination if there are more than 15 stations counted as being in that market and the combined audience share of the proposed commonly-owned radio stations is less than 25 percent, Owens has satisfied the showing necessary under the Commission's revised radio ownership rules.

[3] *Review of Commission's Regulations Governing Television Broadcasting (NPRM)*, MM Docket No. 91-221, 7 FCC Rcd 4111 (1992).

will save approximately $350,000 annually over what it would cost to operate KTIE on a stand-alone basis.[4] These savings will result from shared administrative staff, facilities, and equipment. Specifically, Owens anticipates considerable savings by moving KTIE's operations to Owens' headquarters and studio building in Bakersfield and bringing KTIE's operations under Owens' existing management and staffing structure. The combined operations would allow KTIE access to the administrative, technical, accounting, research, advertising, and program departments of the KCWR/KUZZ-FM/KUZZ-TV organization. Owens anticipates relocating KTIE's transmitter site to KCWR's site, thus eliminating tower rental costs. Owens also anticipates purchasing a new transmitter for KTIE and converting KTIE's current transmitter to an auxiliary, thereby providing KTIE with backup capability. Additionally, Owens notes that combined operations will result in programming benefits as KTIE will have access to Owens' existing research, promotion, program, and music departments. Further, combined operations will allow KTIE to provide public service programming and local public affairs programming that it currently cannot afford.

6. Second, regarding the facilities involved, KCWR is a full-time 5 kilowatt (kw) Class II facility with a restricted night-time directional pattern. KUZZ-FM is a Class B FM station at 5.5 kw effective radiated power (ERP) from an antenna 1,340 feet height above average terrain (HAAT). KUZZ-TV is a UHF television station operating on Channel 45 at 5,000 kw ERP visual and 500 kw ERP aural from an antenna 1,325 feet HAAT, and KTIE is a Class A facility operating at 6 kw ERP from 164 feet HAAT. Owens, citing the *Second Report and Order*, 4 FCC Rcd at 1753, argues that the Commission has indicated that waiver requests involving UHF television stations and Class A FM stations will be more favorably viewed because they "may provide relatively greater public interest benefits and impose relatively fewer public interest costs."

7. Third, with respect to the number of other media outlets the applicant already owns in the relevant market, Owens contends that the proposed combination will result in it owning one AM and two FM stations in the same market. Owens has established that there are at least 16 radio stations whose contours overlap the contours of the proposed commonly owned radio stations and that the combined audience share of stations KCWR, KUZZ-FM and KTIE is 19.1 percent.

8. Fourth, in an amendment filed April 1, 1993, Moosey argues that KTIE, since it began operation in March of 1990, has been a financial burden and has incurred substantial losses. Moosey submits that KTIE lost more than $63,000 in 1990 and an additional $122,000 in 1991. In March of 1991, states Moosey, with its losses mounting and a bank debt to pay, it decided to sell KTIE. Moosey contends that although the station was listed with a sales broker for six months, no buyer was found. Moosey then tried to sell the station on its own without success. During the first six months of 1992, Moosey argues, KTIE lost in excess of $50,000. Moosey submits that to date, the only firm offer it has received for KTIE is from Owens. Moosey asserts that the large number of competing stations in the Bakersfield market coupled with the depressed conditions in the local agriculture and oil industries frustrated its efforts to make KTIE a success.

9. The fifth factor is concerned with the nature of the relevant market in light of our concerns about diversity and competition. Relevant indicia include the number of broadcast outlets, the number of separately owned and operated "voices", and the presence of cable and other non-broadcast media. As to the number of broadcast stations, the Commission has stated that in the context of a one-to-a-market waiver, it will consider "the relevant TV metro market for radio stations and the relevant ADI [Arbitron Area of Dominant Influence] TV market for TV stations." *Second Report and Order*, 4 FCC Rcd at 1760, n.101. Owens states that the Bakersfield TV metro market and the Bakersfield ADI are one and the same. The ADI is ranked 141st in the country, and contains 17 FM stations, 13 AM stations, 4 TV stations, one local daily newspaper and nine magazines with significant circulation. Owens argues that the total of 34 operating television and radio stations substantially exceeds the average number of stations in a market of the same size as the Bakersfield market. *See Second Report and Order*, 4 FCC Rcd at 1756, n.20. Owens states that this represents one broadcast outlet for approximately every 11,260 persons in the market. Further, counting commonly owned stations as one broadcast "voice", there will be 24 separately owned and operated broadcast "voices" in the Bakersfield market if the proposed combination is allowed. Additionally, Owens states that there are 6 radio stations in the Bakersfield market that are authorized but not yet operational. Further, Owens argues that there are 7 stations licensed to adjacent markets that compete in the Bakersfield market to the extent that they command an audience share rating from Arbitron and should realistically be included as broadcast "voices" in the Bakersfield market, thus raising the total number of separately owned broadcast "voices" in the market to 31. Finally, Owens states that the cable penetration for the Bakersfield market is 73 percent with seven cable systems in operation and that, according to the November 1990 Arbitron Television Market Report for Bakersfield, VCR penetration is 78 percent.

10. In evaluating a request for a waiver of the one-to-a-market rule, "our goal in all situations is to permit the public to benefit from such efficiencies of operation as may be achieved through the use of common facilities and staff, consistent with the maintenance of diversity and vigorous competition within the market areas involved." *Second Report and Order Recon.* in MM Docket No. 87-7, 4 FCC Rcd 6489, 6491 (1989).[5] We conclude that Owens' showing in support of a waiver of the one-to-a-market rule meets our case-by-case criteria, and that a waiver in this instance is in the public interest and would not have an adverse effect on diversity and competition in the Bakersfield market.

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[4] Owens projects that the combined operation of KTIE and Owens' existing facilities will result in an estimated annual savings of $333,940 in salaries and related personnel costs, $4,800 in studio rent, $6,000 in utilities, and $3,300 in miscellaneous administrative costs, for a total estimated annual savings of $348,040.

[5] It should also be noted that we do not "require that all five of the criteria be satisfied as a precondition to grant of a waiver." *South Central Communications Corporation*, 5 FCC Rcd 6697, 6698 (1990). *See also Great American Television and Radio Co., Inc.*, 4 FCC Rcd 6347, 6350 n.5 (1989).

11. Owens has shown that joint operation of the stations will result in significant cost savings as well as the potential for enhanced programming and service benefits. In the proceeding revising the radio ownership rules, we recognized that common ownership is likely to result in substantial operating efficiencies and cost savings leading to programming and managerial improvements that will ultimately benefit the public. *See In re Revision of Radio Rules and Policies, supra* at 2776; *Radio Rules, supra* at 6388. Owens has indicated that three year old station KTIE has consistently lost money, and that after the station was on the market for a year, Moosey received no firm offers for KTIE except from Owens. Owens has shown that the joint operation of the stations will result in a public interest benefit and the Commission has, in the past, granted waivers of the one-to-a-market rule under similar circumstances. *See, e.g., Great American Television and Radio Co., Inc.*, 4 FCC Rcd 6347 (1989); *Tulsa 23*, 5 FCC Rcd 727 (1990); *United Radio Group, Inc.*, 7 FCC Rcd 2207 (1992).

12. Furthermore, Owens has demonstrated that the proposed combination will not create any undue concentration of ownership or control of the broadcast media in the Bakersfield market. The Bakersfield market will be served by 30 radio stations and 4 television stations. Of those 34 stations, 24 will remain separately owned. In addition, the voices in the Bakersfield market include 1 daily newspaper, several magazines and cable television, which has a penetration of 73 percent.[6] We further note that the facilities involved do not suggest the kind of market dominance that offends our public interest concerns. Thus, we are persuaded that common ownership and joint operation of the stations will not adversely affect diversity and competition in the Bakersfield market.

13. Accordingly, IT IS ORDERED, That the request for a waiver of the Commission's one-to-a-market rule, 47 C.F.R. § 73.3555(c), IS HEREBY GRANTED; and upon finding the applicants fully qualified, the application (BALH-920918HX) for assignment of license of KTIE(FM), Bakersfield, California, from Moosey Communications, Inc. to Buck Owens Production Company, Inc. IS HEREBY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[6] This number does not include the 6 authorized but non-operational stations in the market. *Second Report and Order*, 4 FCC Rcd at 1759, n.86. It also does not include the 7 radio stations licensed to adjacent markets that command audience share ratings from Arbitron as broadcast "voices" in the Bakersfield market. While these stations may be relevant to a one-to-a-market showing under the case-by-case criteria, we need not reach that issue in this case, since sufficient diversity will remain in the market without considering such stations.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 3, 1993

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS' PETITION FOR NOTICE OF INQUIRY ADDRESSING ACCESS ISSUES

On June 25, 1993, the National Association of Regulatory Utility Commissioners (NARUC) filed a petition requesting that the Commission initiate a Notice of Inquiry (NOI). In its petition, NARUC requests that the Commission consider the issues, objectives, and conclusions raised in a report prepared by the NARUC Communications Committee-sponsored Access Issues Work Group (AIWG). NARUC incorporates the AIWG Report as part of its petition.

NARUC states that the AIWG was formed to address and develop policy recommendations associated with the recent and pending changes in the access environment and focus on a possible comprehensive review of the access rules. NARUC states that the AIWG operates as an open forum in which industry groups and other interested persons have been invited to participate and present their views.

NARUC states that it takes no position on the AIWG Report and the proposed recommendations, but it agrees with AIWG that a comprehensive review of access is needed. NARUC states that the communications industry and regulatory policies have changed significantly since the FCC access rules were developed in 1983. NARUC also states that new technologies have been deployed that provide services not contemplated by the Commission's rules. In addition, NARUC states there are other industry and regulatory changes on the horizon that may well be incompatible with the existing rules. Thus, NARUC argues that there is a critical need for a comprehensive review of access issues.

Interested parties are to file comments on this petition by **September 2, 1993,** and reply comments by **September 23, 1993,** with the Secretary, FCC 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the petition can be obtained from ITS, Inc. at (202) 857-3800 or for public inspection at the FCC, Room 544.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Commission Carrier Bureau, at (202) 632-1300.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN NETWORK EXCHANGE, INC.
CONTACT AMERICA, INC.
LONG DISTANCE SERVICE, INC.,
NATIONAL TELESERVICES, INC.,
TELAMARKETING CORP. OF LOUISIANA, and
TOTEL-TEL USA,
Complainants,

v. File No. E-91-148

SOUTHWESTERN BELL
TELEPHONE COMPANY,
Defendant.

ORDER

Adopted: July 29, 1993; Released: August 6, 1993

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On September 27, 1991, Contact America, Inc., National Teleservices, Inc., and Telamarketing Corp. of Louisiana (collectively "Complainants") along with other complainants, filed the above-captioned formal complaint against Southwestern Bell Telephone Company (SWBT) seeking damages resulting from SWBT's alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988. On May 20, 1993, however, Complainants and SWBT filed a joint motion to dismiss with prejudice the claims of Complainants. The parties state that they have reached a full and complete settlement of all claims asserted by Complainants.

2. We are satisfied that partial dismissal of the complaints with respect to claims by Complainants will serve the public interest by eliminating or reducing the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.[1]

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated under Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that Complainants' and SWBT's Joint Motion to Dismiss With Prejudice IS GRANTED.

4. IT IS FURTHER ORDERED that the Petitions for Reconsideration filed on April 14, 1993 by Complainants and SWBT ARE DISMISSED AS MOOT insofar as they relate to the claims of Complainants in the above-captioned complaint.

5. IT IS FURTHER ORDERED that the above-captioned complaint proceeding IS DISMISSED and IS TERMINATED to the extent it relates to the claims of Contact America, Inc., National Teleservices, Inc., and Telamarketing Corp. of Louisiana.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Enforcement Division
Common Carrier Bureau

[1] On March 15, 1993, the Commission released an order resolving the above-captioned complaint and directing SWBT to pay monetary damages. Memorandum Opinion and Order, FCC 93-75, 8 FCC Rcd 1876 (1993) (*MO&O*). On April 14, 1993, Complainants and SWBT filed petitions for reconsideration of the *MO&O*. Complainants and SWBT, however, have since settled all issues between them raised in the complaints, including the issue of damages. Complainants and SWBT now move that we dismiss Complainants from the proceeding with prejudice. Accordingly, since the parties have settled disputes between them raised by the complaint and the petitions for reconsideration, we will dismiss the claims of Complainants.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Central Virginia	CSR-3760
Educational Telecommunications	CSR-3761
Corporation against District	DC0002
Cablevision Limited Partnership	

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: July 29, 1993; Released: August 6, 1993

By the Chief, Mass Media Bureau:

1. On January 28, 1993, petitions on behalf of Central Virginia Educational Telecommunications Corporation (hereinafter "Central"), licensee of Television Broadcast Stations WNVT (Educ., Ch. 53), Goldvein, Virginia, and WNVC (Educ., Ch. 56), Fairfax, Virginia, were filed with the Commission claiming that District Cablevision Limited Partnership ("District") had declined to carry the stations, even though each station places a Grade B contour over the system's principal headend in Washington, D.C., and the stations are therefore "local" signals within the meaning of Section 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

2. On April 13, 1993, District filed an opposition to this petition,[1] in which it argues that, regardless of whether or not WNVC and WNVT are qualified local NCE stations, its system, which has more than 36 usable activated channels, is currently carrying the following three qualified NCE stations pursuant to the provisions of Section 76.56(a)(iii) of the Commission's Rules: WMPT (Educ., Ch. 22), Annapolis, Maryland, and WETA-TV (Educ., Ch. 26) and WHMM (Educ., Ch. 32), both Washington, D.C. It concludes, therefore, that since it is already meeting its NCE carriage obligations, it is not required to add WNVT and WNVC to its system. In addition, District avers that Central's petition is deficient in that the "Declaration" attached to its petition does not conform with Commission requirements.

3. In its reply to the opposition, filed May 19, 1993,[2] Central states that no "quota" exists for the number of NCE stations required to be carried under the 1992 Cable Act, and it cites paragraph 11 of the *Report and Order in MM Docket No. 92-259 (Must-Carry Order)*, 8 FCC Rcd 2965 (1993), to support its contention that District, as a system with more than 36 channels, is required to carry any local NCE station that requests carriage, except those stations that substantially duplicate a currently-carried station. Central submits copies of its program schedules for February, March and April even though District does not argue that either WNVC or WNVT duplicates existing programming. Central contends that District thus is required to add these two signals as must-carry stations. Additionally, in order to satisfy District's objection to its original "Declaration", Central submits an amended "Declaration" with its reply.

4. District cites Section 76.56(a)(1)(iii) of the Commission's Rules[3] as its basis for not having to carry WNVC and WNVT, and it opposes the acceptance of Central's reply due to its late filing. It argues that the Commission's *Public Notice*, No. 32419,[4] clearly indicates that Central should have filed its reply no later than April 26, 1993. District contends that Central's statement that it was "overwhelmed" with work does not excuse its failure to comply with the deadline.

5. District's reliance on Section 76.56(a)(1)(iii) of our rules to avoid carriage of WNVC and WNVT is in error. Section 76.56(a)(1)(iii) requires that all cable systems with more than 36 channels must carry a *minimum* of three NCE channels, but it does not preclude requiring such a system to carry additional NCE channels. Indeed, the *Must-Carry Order* specifically states: "[s]ystems with a capacity of more than 36 usable activated channels are *generally required* to carry the signals of *all* qualified local NCE stations requesting carriage" (emphasis supplied).[5] The only exception to this requirement is when there is substantial programming duplication between local NCE stations, a circumstance not present here. With regard to the issue of late filing, we note that both Central's reply and District's opposition[6] appear to have been late filed. Although we admonish the parties for having failed to meet our filing requirements, we will accept both late-filed pleadings out of our interest in resolving this case on a complete record.

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[1] An Erratum to this opposition was filed on April 14, 1993.

[2] Petitioner filed a concurrent motion to file its reply out of time.

[3] Section 76.56(a)(iii) states in pertinent part:

> "Systems with more than 36 usable activated channels shall be required to carry the signals of three qualified ocal NCE educational television stations; however a cable system with more than 36 channels shall not be required to carry stations whose programming substantially duplicates the programming of another qualified local NCE station."

[4] The Commission adopted its *Must-Carry Order*, 8 FCC Rcd 2965 (1993), on March 11, 1993. In view of the fact that the rules adopted therein could have an impact upon a cable system's obligation to carry certain noncommercial educational stations, and could also affect the resolution of a disputed carriage request already on file with the Commission, parties opposing such requests on file were permitted 15 days to file a supplemental pleading after the release date of the *Must-Carry Order, supra*. Public Notice, "Carriage of Noncommercial Educational Stations by Cable Television Systems," Mimeo No. 32419 (released March 26, 1993). Replies to such supplemental oppositions could be filed within 5 days. *Id.*

[5] *Must-Carry Order*, 8 FCC Rcd at 2968.

[6] The Commission's March 23 Public Notice specifically stated that *supplemental oppositions* were to be allowed an additional 15 days to be filed, not the original opposition. District's original opposition was not filed until April 13, 1993; the thirty day response time from the date of filing of Central's petition would have expired on March 1, 1993.

6. In light of the foregoing, therefore, the complaints filed January 29, 1993, by Central Virginia Educational Telecommunications Corporation ARE GRANTED, in accordance with Section 615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and District Cablevision Limited Partnership IS ORDERED to commence carriage of Stations WNVT and WNVC forty-six (46) days from the release date of this *Order*. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by Section 0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Independence Public Media of Philadelphia, Inc. against Cablevision of Pennsylvania, Inc.	CSR-3838-M PA0806
Request for Carriage	

MEMORANDUM OPINION AND ORDER

Adopted: July 29, 1993; Released: August 6, 1993

By the Chief, Mass Media Bureau:

1. On February 23, 1993,[1] a petition on behalf of *Independence Public Media of Philadelphia, Inc., licensee of* Station WYBE (Educ., Ch. 35), Philadelphia, Pennsylvania, was filed with the Commission claiming that Cablevision of Pennsylvania, Inc., operator of a cable television system serving Norristown, Pennsylvania, had declined to carry the station, even though Philadelphia is within fifty miles of the system's principal headend at Norristown, Pennsylvania, and it is therefore a "local" signal within the meaning of Section 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). No opposition to this petition has been filed.

2. On April 8, 1993, the United States District Court of the District of Columbia issued a decision in the litigation involving *Turner Broadcasting System, Inc., et al., v. Federal Communications Commission*, Civil Action No. 92-2247 (D.D.C. April 8, 1993), which upheld the provisions of the 1992 Cable Act that had been challenged as violating plaintiffs' constitutional rights and terminated the 120 day *Standstill Order* previously issued in this case.

3. Since no other pleadings were filed in this matter within the fifteen (15) day period specified by the Commission in its Public Notice, Mimeo No. 32419 (released March 26, 1993), the complaint filed February 23, 1993, by Independence Public Media of Philadelphia, Inc. IS GRANTED, in accordance with Section 615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and Cablevision of Pennsylvania, Inc. IS ORDERED to commence carriage of WYBE forty-six (46) days from the release date of this *Order*. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by Section 0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] Although WYBE's petition was originally filed February 23, 1993, it was not perfected and accepted for filing until May 27, 1993.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Community Television Foundation of South Florida, Inc. against National Cable Limited — CSR-3786

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: July 29, 1993; Released: August 6, 1993

By the Chief, Mass Media Bureau:

INTRODUCTION

1. On October 5, 1992, the Cable Television Consumer Protection and Competition Act of 1992 ["the Cable Act"] became law.[1] On December 4, 1992, the Cable Act's requirements for mandatory carriage of certain noncommercial educational stations set forth in §5 of the Act became effective.[2] On February 17, 1993, Community Television Foundation of South Florida, Inc., licensee of Station WPBT (Educ., Channel 2), Miami, Florida, filed a complaint seeking to ensure the station's carriage on channel 2 on the cable system serving Palm Beach County, Florida which is operated by National Cable Limited ("National"). National filed an opposition to this complaint on March 11, 1993,[3] and supplemented the opposition on April 13, 1993.[4]

SUMMARY OF PLEADINGS

2. WPBT complains that, despite its status as a qualified local noncommercial educational television station which places a Grade B contour over National's headend and which is entitled to on-channel carriage rights on cable channel 2 on National's cable system, National has repositioned WPBT to channel 35. This, states WPBT, is contrary to the station's wishes and, therefore, is a violation of its rights under the 1992 Cable Act and the Commission's implementing rules. WPBT notes that on March 29, 1990, on July 19, 1985, and at all times until approximately December 1, 1992, it was carried on cable channel 2 by National. On or about that date, however, National substituted Discovery on channel 2, without notice to WPBT, and placed WPBT on cable channel 35. WPBT requested continued carriage on cable channel 2 on December 10, 1992. It states that National refused to do so by letter dated December 17, 1992.

3. In opposition, National argues that it has not refused to carry WPBT or to place it on any specific channel; rather, it merely stated that it would consider WPBT's request after a court upheld the constitutionality of the must-carry provisions of the 1992 Cable Act and the Commission adopted implementing rules. National notes that WPBT has not paid a filing fee with its must-carry complaint, and that its principal community is more than fifty-five miles from National's headend. National states that it already carries another noncommercial educational station affiliated with the State public television network, and it has asked WPBT for its programming schedule, which it has yet to receive, so it may compare the two stations for potential duplication. National suggests either that the Commission dismiss this complaint, or that it allow National to supplement its opposition after the Commission adopts its mandatory carriage rules and the constitutionality of the statutory must-carry provisions is resolved. In its supplemental opposition, National states that it is carrying WPBT and that it has no present intent to cease doing so, but that it has not repositioned WPBT since December 4, 1992, and that WPBT is not in fact entitled to on-channel carriage rights until October 6, 1993.

DISCUSSION

4. We uphold WPBT's complaint against National. Initially, we note that on April 8, 1993, the United States District Court of the District of Columbia issued a decision in the litigation involving *Turner Broadcasting Systems, Inc., et al. v. Federal Communications Commission*, Civil Action No. 92-2247 (D.D.C. April 8, 1992), which upheld the provisions of the 1992 Cable Act that had been challenged as violating plaintiffs' constitutional rights and which terminated the 120 day *Standstill Order* previously issued in the case. Moreover, §5(g)(5) of the Cable Act, as implemented by §76.57(b) of the Commission's Rules, requires that the signal of a noncommercial educational broadcast station carried on a cable television system pursuant to the must-carry requirements must appear on the cable system channel number on which the qualified local noncommercial educational station is broadcast over-the-air or on the channel on which it was carried on July 19,

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[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[2] 47 U.S.C. §535.

[3] On March 11, 1993, the Commission adopted a *Report and Order in MM Docket No. 92-259*, 8 FCC Rcd 2965 (1993) ["*Report and Order*"]. In view of the fact that the rules adopted therein could have an impact upon a cable system's obligation to carry certain noncommercial educational stations, and could also affect the resolution of a disputed carriage request already on file with the Commission, parties opposing such requests on file were permitted 15 days to file a supplemental pleading after the release date of the *Report and Order, supra*. Public Notice, "Carriage of Noncommercial Educational Stations by Cable Television Systems," Mimeo No. 32419 (released March 26, 1993). Replies to such supplemental opposition could be filed within 5 days. *Id.*

[4] In addition, National filed a "Request for Extension of Time" on May 3, 1993, for ten more days to and including May 13, 1993, to supplement its opposition. On May 10, 1993, WPBT filed an opposition to this request. On May 12, 1993, National filed a letter stating that it believed current negotiations with WPBT would ". . . result in a settlement of all issues between the parties." Thereafter, no further pleadings were filed, and Commission staff was informed by telephone that the negotiations had ceased. In view of these facts, it is no longer necessary to rule on National's "Request for Extension of Time" or on WPBT's opposition to it.

1985, at the election of the noncommercial educational station. WPBT's assertion is unrefuted that it was carried on National's system serving Palm Beach County, Florida on cable channel 2 on July 19, 1985. WPBT elects to continue to be carried on that channel, and it has been entitled to such carriage since December 4, 1992, the effective date of §5 of the 1992 Cable Act.[5]

5. National's argument challenging WPBT's rights to on-channel carriage are not persuasive. WPBT is clearly a qualified noncommercial educational television station within the meaning of the 1992 Cable Act and our rules. Its assertion that it places a Grade B contour over National's headend, and is therefore a "local" signal entitled to mandatory carriage on National's system, is unrefuted. Moreover, National has not submitted any additional showings to meet its burden of proof concerning its allegation of potential program duplication by WPBT. Finally, we note that noncommercial stations are not required to submit filing fees to the Commission for processing their mandatory carriage requests.

6. In view of the foregoing, we find that grant of WPBT's petition is in the public interest.

7. Accordingly, IT IS ORDERED, That the petition for special relief (CSR-3786) filed February 17, 1993, by Community Television Foundation of South Florida, Inc. IS GRANTED in accordance with §615(g)(5) and with §615(j)(3) (47 U.S.C. §535) of the Communications Act of 1934, as amended.

8. IT IS FURTHER ORDERED, That National Cable Limited SHALL CARRY the signal of WPBT on cable channel 2, on National's cable system serving Palm Beach County, Florida, within forty-six (46) days of the release date of this *Order*. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[5] We note that the Commission Rule implementing an October 6, 1993 deadline for fulfilling a local must-carry station's channel positioning request applies only to commercial stations. *See* 47 C.F.R. §76.57(d). The channel positioning requirements for noncommercial stations set forth in the 1992 Cable Act were self-effectuating, and became effective on December 4, 1992.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-229

In the Matter of

Amendment of Section 73.202(b), RM-8296
Table of Allotments,
FM Broadcast Stations.
(Panacea, Florida)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 23, 1993; Released: August 6, 1993

Comment Date: September 27, 1993
Reply Comment Date: October 12, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by EME Communications ("petitioner"), requesting the allotment of Channel 263A to Panacea, Florida, as that community's first local aural transmission service.[1] Petitioner states its intention to apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 263A to Panacea, Florida, as that community's first local aural transmission service. Channel 263A can be allotted to Panacea in compliance with the Commission's minimum distance separation requirements with a site restriction of 14.6 kilometers (9.1 miles) southeast.[2]

3. The Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Panacea, Florida	--	263A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **September 27, 1993,** and reply comments on or before **October 12, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Clyde Scott, Jr.
Rt. 3, Box 485-C
Moultrie, Georgia 31768
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

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[1] Although petitioner's request was signed and the address provided, it failed to include an affidavit verifying that the statements contained in the petition were accurate to the best of its knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.401(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. *See also Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911, n.41 (1990). Petitioner is requested to rectify this omission in its comments.

[2] The coordinates for Channel 264A at Panacea are North Latitude 29-54-33 and West Longitude 84-21-01.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-134

In the Matter of

Amendment of Section 73.606(b), RM-8226
Table of Allotments,
TV Broadcast Stations.
(Ishpeming, Michigan)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 26, 1993; Released: August 6, 1993

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 8 FCC Rcd 3539 (1993), issued in response to a petition filed by Thomas Scanlan ("petitioner"), proposing the allotment of VHF Television Channel 10 to Ishpeming, Michigan, as that community's first local television service. Petitioner filed comments reiterating his intention to apply for the channel if allotted. No other comments were received.

2. Ishpeming (population 7200),[1] in Marquette County (population 70,887), is located in the Upper Peninsula of Michigan, approximately 20 kilometers (13 miles) southwest of Marquette, Michigan.

3. We believe the public interest would be served by allotting Channel 10 to Ishpeming, Michigan, since it would provide the community with its first local television transmission service. As indicated in the *Notice*, VHF Television Channel 10 can be allotted to Ishpeming in conformity with the minimum distance separation requirements of Section 73.610 of the Commission's Rules provided there is a site restriction 27.3 kilometers (16.9 miles) west of the community.[2] The allotment of Channel 10 to Ishpeming requires a minus offset.[3] Although the Commission has imposed a temporary freeze on new television allotments in certain metropolitan areas, the allotment at Ishpeming is not affected thereby.[4] Since Ishpeming is located within 400 kilometers (250 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been obtained for this allotment.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 20, 1993,** the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Ishpeming, Michigan	10-

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Population figures are taken from the 1990 U.S. Census.

[2] The coordinates for Channel 10 at Ishpeming are 46-31-23 and 88-00-52.

[3] "A station with a plus or minus offset is required to operate with its carrier frequency 10 kHz above or below the normal carrier frequency. A different offset between two television stations reduces interference and makes possible the separation criteria set forth in our Rules." *Crandon, Wisconsin*, 3 FCC Rcd 6765 n.1 (1988).

[4] The Commission has imposed a freeze on new television allotments in certain metropolitan areas. *See Notice of Inquiry*, 2 FCC Rcd 2125 (1987) and *Order*, 52 FR 28346, July 29, 1987.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-17

In re Applications of	
ANNETTE B. GODWIN	File No. BPH-891129MF
FERNANDINA BEACH FM LIMITED PARTNERSHIP	File No. BPH-891129MH
MARTIN A. SECREST	File No. BPH-891130MH
FIRST COAST BROADCASTING, INC.	File No. BPH-891130ML
EMILY METCALF	File No. BPH-891130MO

For Construction Permit for
New FM Station, Channel 287A,
Fernandina Beach, Florida

MEMORANDUM OPINION AND ORDER

Adopted: July 28, 1993; Released: August 6, 1993

By the Review Board: MARINO (Chairman), BLUMENTHAL, and GREENE.

1. The Board has before it a Petition For Reconsideration, filed July 19, 1993, by Emily Metcalf and directed to our *Decision*, FCC 93R-28, released June 17, 1993.

2. In brief, our *Decision* affirmed the *Initial Decision*, 7 FCC Rcd 7902 (ALJ 1992), most importantly in ratifying the grant of the subject Construction Permit to Annette B. Godwin.[1] As to Metcalf, our *Decision* noted that the ALJ had ranked her as the runner-up to Godwin on a comparative basis.[2] Our *Decision* also: (1) observed that "Metcalf's exceptions do not argue that, on a comparative basis, the ALJ erred in ranking her abaft Godwin";[3] and (2) "decline[d] to formally overrule" the ALJ's award of 100% ownership/management integration credit to Metcalf herself,[4] despite some strong exceptions to the ALJ's grant of that credit.

3. In the petition now before us, "Metcalf does not seek reconsideration of the Board's treatment of Godwin." Petition at 2. Rather, Metcalf takes issue with the Board's nondecisional observation that, should Godwin fall, Metcalf's status can be more closely scrutinized and the claims of her opponents re-evaluated.

4. Metcalf's petition is frivolous. Having not excepted to the Board as to her second-place comparative ranking in the first instance, and (properly) not seeking the "gold" belatedly in her reconsideration petition, Metcalf nonetheless asks the Board to here play the part of a demented Rumpelstiltskin so as to spin straw into *straw*. This we will not do, for as we opined in our *Decision* with respect to another applicant "*lex non praecipit inulia, quia inutilis labor stultus.*"[5] Insofar as our *Decision* stated the obvious, to wit, that Metcalf's integration credit can be later re-evaluated (either by a subordinate authority upon remand or by a higher authority upon review), Metcalf's immediate umbrage is wasted. Patently not having triggered the legal grounds for reconsideration set forth in 47 CFR § 1.106, Metcalf's petition shall receive its due.

5. ACCORDINGLY IT IS ORDERED, That the Petition for Reconsideration, filed July 19, 1993, by Emily Metcalf IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumentha
Member, Review Board

[1] Godwin has filed with the full Commission a Contingent Application for Review on July 19, 1993, and reports that Metcalf's two other competitors, Secrest and Fernandina Beach FM, have also filed Applications for Review. *See* Request For Establishment Of Procedural Deadlines, filed by Godwin on July 23, 1993 with the Commission.

[2] *Decision*, FCC 93R-28 at ¶ 14.

[3] *Id.*

[4] *Id.*, at ¶ 16. We did, however, note in passing that several of the exceptions raised pertinent questions about Metcalf's credit, which could be more closely scrutinized "[s]hould Godwin fall for any reason," *see id.*

[5] *Decision*, FCC 93R-28 at ¶ 19 ("the law commands not useless things, because useless labor is foolish").

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-400

In re Applications of

MABLETON BROADCASTING COMPANY, INC.	File No. BPH-870706ML
GONZALES BROADCASTING, INC.	File No. BPH-870707MJ
BOLTON BROADCASTING, LIMITED	File No. BPH-870710MD
VOTH BROADCASTING COMPANY	File No. BPH-870710MF
METROPOLITAN MANAGEMENT CORPORATION	File No. BPH-870710MY
LORENZO JELKS	File No. BPH-870710MZ
QRW PARTNERS LIMITED PARTNERSHIP	File No. BPH-870710NF
MABLETON COMMUNICATIONS, LIMITED	File No. BPH-870710NQ

For a Construction Permit for a New FM Station on Channel 273A (102.5 MHz) at Mableton, Georgia

ORDER

Adopted: July 29, 1993; Released: August 6, 1993

By the Review Board: MARINO (Chairman), BLUMENTHAL, and GREENE.

1. By *Order*, FCC 93R-33, released July 1, 1993, the Review Board directed the above-captioned parties to file within fourteen days:

> (1) their notices of appearances identifying their current counsel of record; and (2) a declaration stating they are continuing to prosecute their applications.

The Board expressly cautioned that any party failing to respond in the prescribed time and manner "shall be deemed to have no interest in further prosecution of its application and will be dismissed pursuant to 47 CFR § 73.3568(b)."[1]

2. All of the parties have timely responded to the *Order* except QRW Partners Limited Partnership. That applicant, lately represented by Clarence E. Dilday, Esquire of Boston, Massachusetts, had continued to actively participate in the proceeding following the issuance of the *Supplemental Initial Decision*, 7 FCC Rcd 4431 (ALJ 1992), by filing a responsive brief, a notice of intent to participate in oral argument, and by appearing at the February 5, 1993 oral argument before the Board. Prepublication copies of the *Order* were mailed to the personal attention of individuals connected to QRW, including Clarence Dilday, at their last address of record. QRW has apparently elected not to respond.[2]

3. Section 73.3568(b) provides that:

> Failure to prosecute an application, or failure to respond to official correspondence or request for additional information, will be cause for dismissal.

QRW, by its silence, is deemed to have failed to prosecute its application, in addition to failing to respond to our official request for additional information. Its application will therefore be dismissed. *See Rita A. Capobianchi*, 6 FCC Rcd 4631 (1991) (upholding dismissal of applicant pursuant to § 73.3568(b) for failure to respond to request by the Audio Services Division for additional financial information); *see also generally LRB Broadcasting*, 8 FCC Rcd 3076 (1993); *Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419 (1986).

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[1] The *Order* sought clarification, in view of events described therein, as to "whether certain of the captioned applicants are continuing to prosecute their applications and who is currently appearing for others in the case." *Order* at ¶ ¶ 2-3.

[2] The Commission has long recognized the rebuttable presumption that "an item mailed is presumed to be received by the addressee." *Denver MDS Co.*, 2 FCC Rcd 643 (1987) (citing *Lakeland Cablevision, Inc.*, 66 FCC 2d 452 (1977); *Midwest Video Corp.*, 43 FCC 2d 262 (1973); *El Paso Cablevision, Inc.*, 27 FCC 2d 835 (1971); *Delaware County Cable Television Co.*, 13 FCC 2d 899 (1968)); *see also Juan Galiano*, 5 FCC Rcd 6442 (1990), *recon. denied*, 6 FCC Rcd 895 (1991). The *Order* was mailed to Clarence E. Dilday, Esq. at the offices of Dilday & Associates, 16 Morley Street, Boston, MA 02119. This was the address provided on the cover page of QRW's brief filed in response to the *Supplemental Initial Decision*. We note also that Mr. Dilday successfully received at that address a letter from the Board dated Jan. 6, 1993, regarding the scheduling of oral argument. A copy of the instant *Order* will also be sent to that address.

4. ACCORDINGLY, IT IS ORDERED, That, pursuant to 47 CFR § 73.3568(b), the application of QRW Partners Limited Partnership (File No. BPH-870710NF) for a construction permit for a new FM station on Channel 273A at Mableton, Georgia, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY
GTE HAWAIIAN TELEPHONE
COMPANY INCORPORATED
MCI INTERNATIONAL, INC.
SPRINT COMMUNICATIONS File No. ITC-93-029
COMPANY
LIMITED PARTNERSHIP
TELEFONICA LARGA DISTANCIA
DE PUERTO RICO
THE ST. THOMAS AND SAN JUAN
TELEPHONE COMPANY, INC.
TRT/FTC COMMUNICATIONS, INC.
WORLD COMMUNICATIONS, INC.

Joint Application for Authorization Under Section 214 of the Communications Act of 1934, as Amended, to Construct, Acquire Capacity in and Operate a High Capacity Digital Submarine Cable System Between and Among the United States Mainland, Mexico, U.S. Virgin Islands, Spain, Italy and Portugal

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: July 13, 1993; Released: July 28, 1993

By the Acting Chief, Common Carrier Bureau:

1. On November 10, 1992, eight United States international service carriers (hereinafter referred to as Joint Applicants)[1] filed the above captioned Joint Application requesting authority pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214 (1982), to construct and operate a high capacity digital submarine cable system known as the COLUMBUS II Cable System, extending from Mexico, to the U.S. mainland, then to the U.S. Virgin Islands (U.S.V.I.), then across the Atlantic Ocean to a branching unit which extends to both Spain and to another branching unit which extends to both Italy and to Portugal. Segments of the COLUMBUS II Cable System operating between the U.S. mainland and the U.S.V.I. will be used in tandem with corresponding segments on the AMERICAS-1 Cable System (FCC File Nos. SCL-93-002, ITC-93-030), permitting the balancing of traffic and sharing of restoration capabilities between the two cable systems. These combined segments will be known as the "Common Segment."[2]

2. The Joint Application was placed on public notice on November 18, 1992. STC Submarine Systems, Inc. (STC) filed comments requesting the Commission to condition the requested Section 214 authorization and accompanying cable landing license on the Joint Applicants' competitive procurement of equipment and services for COLUMBUS II. AT&T and STSJ filed a joint reply. On March 12, 1993, AT&T filed a letter requesting the Commission to bifurcate the proceeding, and consider TLD's ownership interest apart from the other Joint Applicants.[3] TLD opposed AT&T's request, and AT&T responded. On May 7, 1993, the Commission, in a public notice, requested additional comments on AT&T's request. MCII and TLD filed comments, and AT&T and TLD filed reply comments. For the reasons discussed below, we partially grant the Joint Application.[4]

3. The proposed COLUMBUS II Cable System consists of nine segments.[5] The Common Segments B and N will be comprised of 2 fiber pairs, each employing AT&T's latest

[1] The Joint Applicants include American Telephone and Telegraph Company (AT&T), GTE Hawaiian Telephone Company Incorporated (HTC), MCI International, Inc. (MCII), Sprint Communications Company Limited Partnership (Sprint), Telefonica Larga Distancia de Puerto Rico (TLD), The St. Thomas and San Juan Telephone Company, Inc. (STSJ), TRT/FTC Communications, Inc. (TRT/FTC), and World Communications, Inc. (Worldcom).

[2] *See infra* n.5.

[3] Letter from Elaine R. McHale, Senior Attorney for AT&T, to Donna Searcy, Secretary of the FCC, dated March 12, 1993. AT&T's letter referenced a previously filed request by Sprint on January 19, 1993 that the Commission consider in future proceedings involving TLD both the general issue of reciprocal entry rights, and the issue of how Spain's treatment of U.S. carriers may affect grant of additional Section 214 authority to Spanish-owned carriers.

[4] In a companion order, we grant the Joint Applicants' request for a cable landing license (File No. S-C-L-93-001, DA 93-908, adopted July 13, 1993).

[5] The Joint Application identifies these as: Segments T1, T2, T3, T4, T5 and T6, which are, respectively, the cable station at Cancun, Mexico; the cable station in West Palm Beach, Florida; the cable station at Magens Bay, St. Thomas, U.S.V.I.; the cable station at Sardina, Spain; the cable station at Palermo, Italy; and the cable station at Funchal, Portugal; Segment A -- the submarine cable linking Segments T1 and T2; Segment B -- the submarine cable linking Segments T2 and T3; and Segment C -- the submarine cables linking Segments T3, T4, T5 and T6.

The portions of COLUMBUS II and AMERICAS-1 identified as the Common Segment are: (a) COLUMBUS II -- Segment B, and parts of Segments T2 and T3 of that system (b) AMERICAS-1 -- Segments N, T1 and part of T2 of that system (*see* AMERICAS-1 Section 214 authorization, DA 93-911, adopted July 13, 1993, for description of AMERICAS-1 segments); and (c) Segment L, a terrestrial fiber optic cable linking the Vero Beach (AMERICAS-1) and West Palm Beach (COLUMBUS II) cable stations. Because Segment L consists of a domestic facility,

SL2000 technology, operating at 2.4 Gigabits per second (Gbps). One fiber pair in each segment will be used for service while the other will be used for restoration. Segments A and C of the COLUMBUS II Cable System will employ technology operating at 560 Megabits per second (Mbps). Unless otherwise noted, the fiber pairs in these segments will be active, with none reserved for restoration. Segment A will consist of two fiber pairs. Subsegment C1, between St. Thomas and the First Branching Unit (BU1), will consist of three fiber pairs. Subsegment C2, between BU1 and Sardina, Spain, will consist of four fiber pairs, with one fiber pair reserved for restoration. Subsegment C3, between BU1 and the Second Branching Unit (BU2), will consist of two fiber pairs. Subsegments C4 and C5, between BU1 and Palermo, Italy, and between BU2 and Funchal, Portugal, respectively, will consist of one fiber pair each.

4. The design capacity of the COLUMBUS II Cable System Segments A, B, and C is as follows:

SEGMENT OR SUBSEGMENT	NUMBER OF BASIC SYSTEM[6] MODULES	NUMBER OF MIUs[7] (DESIGN)	NUMBER OF 64 kbps VOICE PATHS
A	8	504	15,120
B	32	2016	60,480
C1	12	756	22,680
C2	16	1008	30,240
C3	8	504	15,120
C4	4	252	7,560
C5	4	252	7,560

5. *Public Interest Determination.* Section 214 of the Communications Act requires that the Commission make a finding that the public convenience and necessity will be served by authorization of the facilities requested in the Joint Application by determining "whether the specific facility chosen and the use to be made of that facility are required by the public convenience and necessity."[8] In making this determination, the Commission traditionally has considered such factors as demand, cost, media and route diversity, restoration, intramodal and intermodal competition, technological innovations and international comity.[9] After reviewing these factors in relation to this cable system, we conclude that projected circuit demand as supplied by the Joint Applicants, along with other factors, supports the construction and operation of COLUMBUS II to meet the telecommunications needs of the Joint Applicants and their correspondents in the Atlantic Ocean Region during the 1994-2010 time frame. We conclude that the introduction of COLUMBUS II as proposed will enhance media and route diversity by adding another independent cable route. A comparison of the costs for previously authorized digital cable facilities in the Caribbean and Atlantic Ocean Regions demonstrates that COLUMBUS II will continue the trend of providing increased capacity while reducing per circuit costs. The proposed COLUMBUS II Cable System will introduce significant technological developments into the submarine cable field which in turn will provide substantial benefits to users. In addition, the introduction of COLUMBUS II will enhance intramodal competition in the Atlantic Ocean Region and encourage both private and common carrier cable operators to innovate and price their offerings in a manner that is calculated to attract and retain customers. We also find that the introduction of COLUMBUS II will increase intermodal competition with INTELSAT and separate satellite system providers, spurring existing providers of both cable and satellite capacity to respond competitively. Finally, with over fifty telecommunications administrations and entities from forty-three foreign locations participating in COLUMBUS II, we conclude that COLUMBUS II will promote international comity.

6. *TLD's Ownership Interest.* AT&T argues that the circumstances associated with TLD's participation in the AMERICAS-1 and COLUMBUS II Cable Systems have materially changed since the Joint Applications were filed. Since that time, TLD has been acquired by Telefonica de Espana, the monopoly provider of telecommunications services in Spain.[10] AT&T states these circumstances present complex and novel issues[11] requiring careful analysis, yet do not affect the issues or the public interest insofar as participation in these cable projects by the remaining Joint Applicants is concerned. Moreover, AT&T states that granting the applications of the Joint Applicants other than TLD while the Commission evaluates the issues attendant to TLD's ownership will avoid the risk of increases in the cable systems' costs that would likely accompany a delay in the Commission authorization. AT&T states that capacity assigned to TLD could be held in reserve for such time as necessary until the Commission renders a decision as to TLD's participation. The cable system ownership schedules would be appropriately modified to reflect such treatment. If TLD were later permitted to participate, the capacity set aside would be available to TLD at the same cost and terms as available to the other original owners of the systems. Conversely, if TLD is not permitted to participate, any payments it made would be refunded to it at no financial penalty. AT&T believes that the impact of bifurcation upon the cable projects would be minimal, and no different from

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the Joint Applicants do not include it for purposes of this authorization as belonging to either the AMERICAS-1 or COLUMBUS II Cable Systems.

[6] The Basic System Modules (BSM) operate at 140 Mbps with each BSM consisting of 63 Minimum Investment Units (MIUs).

[7] A MIU is the minimum unit of investment for ownership in the AMERICAS-1 Cable network, allowing the use of 2.048 Mbps and the additional approximately 421 kilobits per second (kbps) required for multiplexing in each direction. Each MIU includes thirty 64 kbps voice paths. For voice services, digital circuit multiplication equipment (DCME) can be employed to derive about 150 virtual voice paths from a MIU.

[8] *See AT&T et al., (TAT-7 Order),* 73 FCC 2d 248, 256 (1979).

[9] *See, e.g., AT&T et al.* 4 FCC Rcd 1129, 1131 (Com. Car. Bur. 1988) (*TAT-9 Order*). *See also Policies to be Followed in the Authorization of Common Carrier Facilities to Meet Pacific Telecommunications Needs during the Period 1981-1985 (POR Planning),* 102 FCC 2d 353, 355 (1985) and *North Atlantic Facilities Planning,* 3 FCC Rcd 3979, 3986 (1988); *All America Cable and Radio Inc., et. al.,* 67 FCC 2d 451, 469 (1978).

[10] *See Telefonica Larga Distancia de Puerto Rico et. al.,* 8 FCC Rcd 106 (1992)(*TLD Order*).

[11] AT&T states TLD's ownership raises issues of unfair and unequal international market access, potential market abuse by a foreign monopoly carrier, self-correspondency, above-cost accounting rates, and violation of reciprocity requirements of the Cable Landing License Act.

the impact of the addition or withdrawal of owners that typically occurs during the time period when Construction and Maintenance Agreements (C&MA) are being executed or amended.

7. MCII states that, if the Commission determines it must review either the regulatory conditions imposed by the *TLD Order* and/or reciprocity issues, such matters should be addressed in a separate proceeding so as to avoid delay in the authorization of these cable systems. MCII suggests the Commission condition TLD's cable authorization subject to the outcome of such a proceeding. However, MCII opposes actions by the Commission, such as not granting authorization for all applicants, that would prevent one or more U.S. applicants from competing with other U.S. applicants on a level playing field. MCII states that delaying a carrier's authorization could harm customers of the carrier and the carrier's business if customers perceive a delay to be a business risk and take business elsewhere. In addition, MCII argues a delay could signal foreign correspondents that cable systems with heavy U.S. participation are investment risks due to possible delays in the U.S. regulatory approval process. MCII is concerned that if potential investors are wary, they could be deterred from investing upfront in common carrier cables.

8. In response, TLD states that not only is bifurcation unnecessary, it will harm TLD in relation to its competitors, especially AT&T, in dealing with foreign correspondents, implementing its strategic plans and concluding new plans with correspondents through the life of the cable systems. TLD argues AT&T has failed to demonstrate why the safeguards of the *TLD Order* are not fully adequate to protect U.S. competitors in this situation. In addition, TLD argues AT&T has failed to establish factually how TLD's minimal ownership of facilities connecting with Spain might result in anticompetitive actions which will benefit TLD to the detriment of other U.S. carriers. TLD argues AT&T's goal is only to enlarge its competitive edge over TLD by subjecting it to delay. TLD states the Commission has already determined that it can resolve facilities-based applications by the U.S. affiliate of a foreign carrier without further lengthy policy or rulemaking proceedings.

9. After reviewing the record, we conclude that TLD's proposed ownership interest does raise complex and novel issues that require Commission consideration. These issues involve international market access, self-correspondency, and the reciprocity requirements of the Cable Landing License Act. We do not believe that it would be in the interest of any party to delay authorization of the cable pending resolution of these issues. Therefore, we defer granting TLD Section 214 authority to participate in the construction and operation of the COLUMBUS II Cable System until the Commission has determined in a separate proceeding that it is in the public interest to allow TLD to participate. The capacity assigned to TLD shall be held in reserve, and any payments it has made held in an interest bearing account, for such time as necessary until the Commission renders a decision as to TLD's participation. The cable system ownership schedules shall be appropriately modified to reflect such treatment. If TLD is later permitted to participate, the capacity set aside shall be made available to TLD at the same cost and terms as are available to the other original owners of the systems. Conversely, if TLD is not permitted to participate, any payments it has made shall be refunded to it with interest, and without financial penalties.

10. *Competitive Procurement.* While expressly supporting the construction of COLUMBUS II, STC requests the Commission to condition approval of the Section 214 authorization and accompanying cable landing license, as it did in *Pacific Telecom Cable, Inc.*,[12] by requiring the Joint Applicants to use a fair and open procurement process in awarding the construction contracts for COLUMBUS II. STC claims that such a procurement process has not been used by the Joint Applicants since the procurement of the cable system has been apparently predetermined, with construction to be supplied by a consortium consisting of Alcatel (of France), AT&T Submarine Systems, and Maristel (of Italy). STC asserts that the proposed new technology is not uniquely available from the consortium, and that STC, along with other suppliers of systems and component parts, could offer compatible technology. STC also argues that a fair and open procurement process would ensure that consumers will gain the full benefits of competition, such as the lowest cost, most advanced features and the highest quality and reliability, in the supply of communications services and in the construction of the underlying facilities. STC also notes that open procurement reinforces the U.S. government's efforts to open telecommunications markets world wide.

11. Although STC cites *Pacific Telecom Cable, Inc.* as precedent for its request that we condition this Section 214 authorization and the accompanying cable landing license, we note that that order involved only a cable landing license for the North Pacific Cable, a non-common carrier submarine cable. The Commission has never imposed conditions on procurement practices in a Section 214 authorization for a common carrier cable. In *Pacific Telecom Cable, Inc.*, the Commission did authorize only a conditional grant of the cable landing license to address specific concerns that foreign interests would be favored over U.S. interests due to the actual foreign ownership of the U.S. end, as well as the potential common foreign ownership of both the U.S. and foreign end, of the cable. Due to those particular concerns, the Commission found it necessary to condition the cable landing license upon a demonstration that "U.S. entities will be provided a reasonable opportunity to participate in the planning, manufacture, installation, operation and maintenance of the proposed cable."

12. We believe that the Joint Applicants demonstrate that qualified suppliers have been afforded a reasonable opportunity to participate in the procurement of COLUMBUS II. In this instance, although AT&T technology will be used for portions of COLUMBUS II, the consortium will not acquire the cable on a sole source, non-competitive basis. As AT&T has shown, the U.S.-supplied segments of COLUMBUS II will employ approximately 118 subcontractors located in more than 16 states to provide components or materials for the construction of COLUMBUS II. Moreover, each of these subcontractors will also engage suppliers for components or materials, so that the number of companies affected by the construction of COLUMBUS II will be considerably greater than the number of imme-

[12] *Pacific Telecom Cable, Inc.*, 2 FCC Rcd 2686 (1987) (Conditional license), 4 FCC Rcd 8061 (1989) (Final license).

diate subcontractors.[13] Furthermore, under price caps regulation, AT&T has the incentive to subcontract with those suppliers that offer a competitive price. Also, the presence of competing cable facilities in the Atlantic Ocean Region will continue to serve as a strong incentive for efficient procurement. As we decided in TPC-4 and TPC-5, given these competitive market circumstances, we can find no public interest benefit for involving the Commission in the management of COLUMBUS II procurement decisions, and we do not believe that it is necessary to condition the grant of COLUMBUS II on assurances of competitive procurement practices.[14]

13. Upon review of the application, we find that the grant of Section 214 authority to the Joint Applicants, except TLD, to construct and operate the COLUMBUS II Cable System will serve the public interest. The cable system will provide much needed connectivity with other digital cable systems in the region, thereby increasing service reliability. Because of the increased connectivity provided by the COLUMBUS II Cable System, both route and path diversity will be increased and the Joint Applicants will be able to utilize restoration alternatives that are not presently available.

14. Accordingly, IT IS ORDERED that pursuant to Section 214 of the Communications Act, as amended, Joint Application File No. I-T-C-93-029 IS PARTIALLY GRANTED, subject to the following terms, conditions, and limitations, and the Joint Applicants, except for TLD, are authorized to:

(a) participate in the construction and operation of the COLUMBUS II Cable System as described in the Joint Application;

(b) acquire and activate capacity in the COLUMBUS II Cable System, on an ownership basis, in accordance with the interests indicated in Appendix A;

(c) acquire capacity, by lease, in such connecting facilities as may be required to extend capacity in the COLUMBUS II Cable System to certified points;

(d) utilize digital circuit multiplication equipment to derive additional voice paths from the circuits (MIUs) authorized herein, in accordance with the appropriate Commission authorizations; and

(e) activate and operate capacity in the COLUMBUS II Cable System and aforementioned extension facilities for the provision of the Joint Applicants' authorized telecommunications services to certified points.

15. IT IS FURTHER ORDERED, that Joint Applicants are authorized to acquire, by lease, appropriate connecting facilities between the West Palm Beach, Florida, and Magens Bay, St. Thomas cable stations and their respective operating offices in the United States, Puerto Rico, and the U.S. Virgin Islands.

16. IT IS FURTHER ORDERED that the capacity assigned to TLD shall be held in reserve until such time that a determination is made in a separate proceeding as to TLD's authorized level of participation. The cable system ownership schedules shall be appropriately modified to reflect such treatment. If TLD is later permitted to participate, the capacity set aside shall be made available to TLD at the same cost and terms as available to the other original owners of the systems. Conversely, if TLD is not permitted to participate, any payments it has made shall be refunded to it with interest, and without financial penalties.

17. IT IS FURTHER ORDERED that the Joint Applicants' tariffs must state that their customers may not resell international private lines or connect them to the public switched network for the provision of international basic telecommunications services, unless authorized to do so by the Commission upon a country-specific finding of resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending.*

18. IT IS FURTHER ORDERED that the Joint Applicants shall make available half-interests in COLUMBUS II capacity to such present and future U.S. carriers as may be authorized by the Commission to acquire such capacity.

19. IT IS FURTHER ORDERED that the Commission retains jurisdiction to reallocate U.S. carriers' interest in capacity herein authorized, as the public interest may require and with any requisite concurrence of the foreign administration or carriers concerned, in order to accommodate additional carriers or for other reasons.

20. IT IS FURTHER ORDERED that the Commission retains jurisdiction over all matters relating to the Joint Applicants' ownership, management, maintenance and operation of the cable system as authorized herein to ensure the most efficient use not only of this cable system but of all means of communications between the United States and the Atlantic Ocean Region.

21. IT IS FURTHER ORDERED that the Commission retains jurisdiction to review the DCME, multiplexing and interworking arrangements and attribution of the costs thereof and to require such changes in the provision of these services and equipment as may be necessary.

22. IT IS FURTHER ORDERED that no Joint Applicant that is a dominant carrier pursuant to the Commission's decision in CC Docket No. 85-107 or CC Docket No. 91-360[15] shall either dispose of any interest in COLUMBUS II capacity it is authorized to acquire to any entity on an ownership basis or dispose of any interest in any such

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[13] *See* Letter from Michael Donnella, Senior Attorney, AT&T to Troy Tanner, Attorney, Federal Communications Commission, dated May 5, 1993. In addition, in its reply comments AT&T and STSJ assert that COLUMBUS II will benefit the U.S. economy generally and the U.S. submarine cable industry specifically by promoting a leadership role for U.S. industry in lightwave technology, ensuring that the U.S. submarine cable industry is a viable competitor in the global market.

[14] *See AT&T et. al.*, 7 FCC Rcd 7758, 7762 (Com. Car. Bur. 1992)(*TPC-5 Decision); AT&T et. al.*, 4 FCC Rcd 8046 (1989)(*TPC-4 Decision).* The Commission came to the same conclusion in response to similar comments filed by STC following the public notice of TPC-4 and TPC-5.

[15] *See International Competitive Carrier*, 102 FCC 2d 812, 822 (1985); *International Services Order*, 7 FCC Rcd 7331 (1992).

capacity in any way to a non-U.S. telecommunications service provider without prior authorization by the Commission.

23. IT IS FURTHER ORDERED that the Joint Applicants shall include COLUMBUS II facility use in the monthly Circuit Status Reports filed pursuant to the Commission's Orders. These reports shall be filed no later than the 20th day of each month providing the information for the preceding month.

24. IT IS FURTHER ORDERED that STC's request to condition the Section 214 authorization of COLUMBUS II is hereby denied.

25. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief, Common Carrier Bureau

VOTING INTERESTS IN THE COLUMBUS II CABLE SYSTEM

APPENDIX A

PARTIES		PERCENT
AACR-DR	(Dominican Republic)	0.64302
ANTEL (ES)	(El Salvador)	0.44444
ANTEL (URU)	(Uruguay)	0.24606
ANTELCO	(Paraguay)	0.19653
APTT	(Austria)	0.21650
BELGACOM	(Belgium)	0.10333
BET	(Barbados)	0.08805
BT	(UK)	0.30755
C&W	(UK)	0.18163
CANTV	(Venezuela)	5.38501
CODETEL	(Dominican Republic)	0.37738
DBP-T	(Germany)	1.62934
EMBRATEL	(Brazil)	4.81705
ENTEL	(Chile)	0.67158
FT	(France)	0.81660
GT&T	(Guyana)	0.04128
GUATEL	(Guatemala)	0.42548
HONDUTEL	(Honduras)	0.50871
ICE	(Costa Rica)	0.18006
INTEL	(Panama)	0.33979
ITC	(Italy)	15.34474
LANDSRADIO	(Curacao)	0.37484
MARCONI	(Portugal)	0.43666
NPTT	(Netherlands)	0.29383
SETAR	(Aruba)	0.07934
SPTT	(Switzerland)	0.09038
ST	(Sweden)	0.11159
STSJ		0.09907
TDH	(Haiti)	0.04964
TELCOR	(Nicaragua)	0.23826
TELECOM	(Colombia)	0.66136
TELINTAR	(Argentina)	2.31005
* TLD		1.47421
TLFN	(Spain)	9.12958
TRICOM	(Dominican Republic)	0.09907
TSTT	(Trinidad)	0.27245
VSNL	(India)	0.81948
VTR	(Chile)	0.01651
AT&T		24.81578
DACOM	(Korea)	0.30042
DGT	(China)	0.20779
HKTI	(Hong Kong)	0.10380
HTC		0.19672
IDC	(Japan)	0.37884
ITDC	(Taiwan)	0.47631
ITJ	(Japan)	0.37038
KDD	(Japan)	0.69032
KT	(Korea)	0.40844
MCI		7.56164
OPTUS	(Australia)	0.19884
PLDT	(Philippines)	0.19021
SINGTEL	(Singapore)	0.09884
SPRINT		2.21040
TELECOMM	(Mexico)	0.74011
TELMEX	(Mexico)	5.76406
TLGS	(Canada)	1.20600
TRT/FTC		0.76788
WCOM		0.08256
TOTALS		100.00000

*TLD's interests will be held in reserve.

SCHEDULE B
08-Oct-92

Notes to Schedule B

1. The percentages shown on Schedule B are based upon a weighted average of percentages shown on Schedule C-1 multiplied by each Subsegment cost (as shown in the latest PG report) then divided by the total Cable System cost.

OWNERSHIP AND ALLOCATION OF CAPITAL, OPERATION, AND MAINTENANCE COSTS OF SEGMENTS A, B AND SUBSEGMENTS C1, C2-1, C2-2, C3, C4, AND C5 AND ALLOCATION OF CAPITAL, OPERATION, AND MAINTENANCE COSTS OF SEGMENT L IN THE COLUMBUS II CABLE SYSTEM

PARTIES	SEGMENT A (PERCENT)	SEGMENT B, L (PERCENT)	SUBSEGMENT C1 (PERCENT)	SUBSEGMENT C2-1 (PERCENT)	SUBSEGMENT C2-2 (PERCENT)	SUBSEGMENT C3 (PERCENT)	SUBSEGMENT C4 (PERCENT)	SUBSEGMENT C5 (PERCENT)
AACR-DR	0.00000	0.44874	1.28400	1.28400	0.25773	0.00000	0.25773	0.00824
ANTEL (EB)	3.20000	0.00430	0.10001	0.10000	0.00000	0.00000	0.00000	0.00000
ANTEL (URU)	0.00000	0.20000	0.20042	0.20013	0.25773	0.10000	0.25773	0.00000
ANTELCO	0.00000	0.10000	0.20042	0.20013	0.25773	0.10000	0.25773	0.00000
APTT	0.10007	0.00430	0.20101	0.00000	0.01040	0.31250	0.01040	0.00000
BELGACOM	0.10007	0.00430	0.20101	0.20013	0.00000	0.00000	0.00000	0.00000
BET	0.00000	0.27001	0.00000	0.00000	0.00000	0.00000	0.00000	0.00000
BT	0.20020	0.17102	0.00404	0.00020	0.00000	0.00000	0.00000	0.00000
C&W	0.00000	0.70004	0.00000	0.00000	0.00000	0.00000	0.00000	0.00000
CANTV	1.10007	0.00040	0.40000	0.20120	0.70100	0.31250	0.70100	1.20720
CODETEL	0.10007	0.00000	0.40000	0.40000	0.25773	0.10000	0.25773	0.00000
DBP-T	1.20000	0.20000	2.40000	0.00014	0.00000	0.31250	0.00000	0.20003
EMBRATEL	0.00007	4.20117	0.04720	0.04020	4.00010	0.70120	4.00010	3.70004
ENTEL	0.10007	0.00000	1.00000	1.20000	0.01040	0.31250	0.01040	0.00000
FT	0.20000	0.40374	0.00040	0.10000	0.00000	1.00070	0.00000	1.20000
GT&T	0.00000	0.17102	0.00000	0.00000	0.00000	0.00000	0.00000	0.00000
GUATEL	3.20020	0.00430	0.10001	0.10000	0.00000	0.00000	0.00000	0.00000
HONDUTEL	3.00007	0.00070	0.20101	0.20013	0.00000	0.00000	0.00000	0.00000
ICE	1.00000	0.00430	0.10001	0.10000	0.00000	0.00000	0.00000	0.00000
INTEL	1.00007	0.00070	0.20101	0.10000	0.25773	0.10000	0.25773	0.00000
IPC	1.00007	2.20070	20.10007	0.00000	20.00070	20.62750	20.00070	0.00000
LANDSRADIO	0.00000	0.00070	0.40000	0.40000	0.25773	0.10000	0.25773	0.00000
MARCONI	0.10007	0.37001	2.40742	10.00000	0.00000	20.00000	0.00000	20.00470
NPTT	0.10007	0.00430	0.70005	1.10004	0.00000	0.00000	0.00000	0.00000
SETAR	0.00000	0.17102	0.10004	0.10000	0.00000	-0.00000	0.00000	0.00000
SPTT	0.00000	0.00000	0.20101	0.00000	0.00000	0.31250	0.00000	0.20003
ST	0.10007	0.00070	0.20101	0.20013	0.00000	0.00000	0.00000	0.00000
STBJ	0.00000	0.41337	0.00000	0.00000	0.00000	0.00000	0.00000	0.00000
TDH	0.00000	0.00010	0.00000	0.00000	0.00000	0.00000	0.00000	0.00000
TELCOR	1.20020	0.00010	0.10001	0.10000	0.00000	0.00000	0.00000	0.00000
TELECOM	0.00000	0.00704	0.70000	0.00704	0.01040	0.31250	0.01040	0.00000
TELINEAR	0.20000	1.01010	2.40742	2.04020	2.57732	1.07000	2.57732	0.20003
*TLD	0.20020	4.27010	0.70005	0.00000	0.25773	0.10000	0.25773	0.20003
TLPN	4.20020	4.20117	20.10100	20.11200	0.00000	0.00000	0.00000	0.00000
TRCOM	0.00000	0.41337	0.00000	0.00000	0.00000	0.00000	0.00000	0.00000
TSTT	0.00000	1.10002	0.00000	0.00000	0.00000	0.00000	0.00000	0.00000
VENI	0.00000	0.17102	0.00400	0.00000	1.20000	0.70120	1.20000	0.00000
VTR	0.00000	0.00070	0.00000	0.00000	0.00000	0.00000	0.00000	0.00000
AT&T	10.00000	40.00040	10.00004	10.00004	20.00000	10.00000	20.00000	1.20000
BACOM	0.00000	0.10743	0.40000	0.20113	0.01040	0.31250	0.01040	0.00000
DGT	0.00000	0.00070	0.20101	0.00000	0.01040	0.31250	0.01040	0.00000
HKTA	0.00000	0.00430	0.10001	0.00000	0.25773	0.10000	0.25773	0.00000
HTC	0.00000	0.10743	0.20101	0.10000	0.25773	0.10000	0.25773	0.00000
IDC	0.00000	0.27401	0.00400	0.20113	0.01040	0.40370	0.01040	0.10041
IDDC	0.00000	0.00040	0.00040	0.00704	0.01040	0.40370	0.01040	0.10041
IDJ	0.00000	0.20000	0.00400	0.20113	0.01040	0.40370	0.01040	0.10041
NDD	0.00000	0.40110	1.00000	0.00000	0.77200	0.00700	0.77200	0.00824
KT	0.00000	0.01000	0.00404	0.40000	0.01040	0.40370	0.01040	0.10041
MCII	7.20000	11.10000	0.04077	0.07001	0.24740	0.31250	0.24740	0.20003
OPTUS	0.00000	0.00430	0.20101	0.00000	0.01040	0.31250	0.01040	0.00000
PLDT	0.00000	0.00070	0.20101	0.10000	0.25773	0.10000	0.25773	0.00000
SINGTEL	0.00000	0.00000	0.10001	0.00000	0.25773	0.10000	0.25773	0.00000
SPRINT	4.20020	0.02100	0.70000	0.20113	1.00000	0.70120	1.00000	0.10041
TELECOMM	2.00020	0.20000	0.00404	0.00020	0.01040	0.31250	0.01040	0.00000
TELMEX	20.00000	1.00040	4.00020	0.10040	1.04000	1.00020	1.04020	0.00824
TLGB	3.00007	1.37407	0.00404	0.20113	1.00000	0.00000	1.00000	0.00000
TWF/TIC	0.00000	0.40110	0.20101	0.10000	0.00000	0.10000	0.00000	0.10041
WCOM	0.00000	0.34004	0.00000	0.00000	0.00000	0.00000	0.00000	0.00000
TOTALS	100.00000	100.00000	100.00000	100.00000	100.00000	100.00000	100.00000	100.00000

*TLD's interests will be held in reserve.

SCHEDULE C-1
88-Oct-88

The percentages shown on Schedule C-1 for Segment A are derived from Schedule E-1 based on the relevant Party's half MIU assignments divided by two times the Notional Capacity as shown on Schedule E-1.

The percentages shown on Schedule C-1 for Segments B and L are derived from Schedule E-2 based on the relevant Party's half MIU assignments divided by two times the Notional Capacity as shown on Schedule E-2.

The percentages shown on Schedule C-1 for Subsegment C1 are based on the relevant Party's transatlantic capacity based upon half MIU assignments in Schedule E-3 divided by two times the Notional Capacities of Schedule E-3.

The percentages shown on Schedule C-1 for Subsegment C2-1 are based on the relevant Party's half MIU assignment in Schedule E-4 divided by two times the Notional Capacity as shown on Schedule E-4.

The percentages shown on Schedule C-1 for Subsegment C2-2 are based on the relevant Party's half MIU assignments in Schedule E-6 divided by two times the Notional Capacity as shown on Schedule E-6.

The percentages shown on Schedule C-1 for Subsegment C3 are based on the relevant Party's half MIU assignments in Schedule E-5 divided by two times the sum of the Notional Capacity as shown on Schedule E-5.

The percentages shown on Schedule C-1 for Subsegment C4 are derived from Schedule E-6 based on the relevant Party's half MIU assignments divided by two times the Notional Capacity as shown on Schedule E-6.

The percentages shown on Schedule C-1 for Subsegment C5 are derived from Schedule E-7 based on the relevant Party's half MIU assignments divided by two times the Notional Capacity as shown on Schedule E-7.

ALLOCATION OF CAPITAL, OPERATING, AND MAINTENANCE COSTS OF SEGMENTS T1, T5, AND T6 AND SUBSEGMENTS T2-1, T2-2, T3-1, T3-2, T4-1, AND T4-2 IN THE COLUMBUS II CABLE SYSTEM

PARTIES	SEGMENT T1, SUBSEGMENT T2-1 (PERCENT)	SUBSEGMENTS T2-2,T3-1 (PERCENT)	SUBSEGMENT T3-2 (PERCENT)	SUBSEGMENT T4-1 (PERCENT)	SEGMENT T5, SUBSEGMENT T4-2 (PERCENT)	SEGMENT T6 (PERCENT)
AACR-DR	0.00000	0.44674	1.20968	1.32450	0.25773	1.50000
ANTEL (ES)	3.50000	0.03436	0.10081	0.16556	0.00000	0.00000
ANTEL (URU)	0.00000	0.30828	0.30242	0.33113	0.25773	0.00000
ANTELCO	0.00000	0.10309	0.30242	0.33113	0.25773	0.00000
APTT	0.16667	0.03436	0.20161	0.00000	0.51546	0.00000
BELGACOM	0.16667	0.03436	0.20161	0.33113	0.00000	0.00000
BET	0.00000	0.27491	0.00000	0.00000	0.00000	0.00000
BT	0.33333	0.17182	0.60484	0.99338	0.00000	0.00000
C&W	0.00000	0.75601	0.00000	0.00000	0.00000	0.00000
CANTV	1.16667	6.83848	5.44356	3.31126	6.70103	4.00000
CODETEL	0.16667	0.61866	0.40323	0.49669	0.25773	0.00000
DSP-T	1.50000	0.30929	3.62903	5.62914	0.00000	1.00000
EMBRATEL	0.66667	4.26117	5.94758	3.64238	4.63918	9.50000
ENTEL	0.16667	0.68282	1.00806	1.32450	0.51546	0.00000
FT	0.50000	0.44674	0.80646	0.16556	0.00000	3.50000
GT&T	0.00000	0.17182	0.00000	0.00000	0.00000	0.00000
GUATEL	3.33333	0.03436	0.10081	0.16556	0.00000	0.00000
HONDUTEL	3.66667	0.06873	0.20161	0.33113	0.00000	0.00000
ICE	1.00000	0.03436	0.10081	0.16556	0.00000	0.00000
INTEL	1.66667	0.06873	0.20161	0.16556	0.25773	0.00000
ITC	1.66667	3.36770	15.12097	0.00000	38.66879	0.00000
LANDSRADIO	0.00000	0.68729	0.40323	0.49669	0.25773	0.00000
MARCONI	0.16667	0.37801	3.42742	18.55629	0.00000	67.00000
NPTT	0.16667	0.03436	0.70565	1.15894	0.00000	0.00000
SETAR	0.00000	0.17182	0.10081	0.16556	0.00000	0.00000
SPTT	0.00000	0.00000	0.20161	0.00000	0.00000	1.00000
ST	0.16667	0.06873	0.20161	0.33113	0.00000	0.00000
STSJ	0.00000	0.41237	0.00000	0.00000	0.00000	0.00000
TDH	0.00000	0.20619	0.00000	0.00000	0.00000	0.00000
TELCOR	1.33333	0.20619	0.10081	0.16556	0.00000	0.00000
TELECOM	0.50000	0.82784	0.70565	0.82781	0.51546	0.00000
TELINTAR	0.33333	1.61512	3.42742	3.64238	2.57732	1.00000
*TLD	0.33333	4.57045	0.70565	0.66225	0.25773	1.00000
TLFN	4.33333	4.26117	20.16129	33.11258	0.00000	0.00000
TRICOM	0.00000	0.41237	0.00000	0.00000	0.00000	0.00000
TSTT	0.00000	1.13402	0.00000	0.00000	0.00000	0.00000
VSNL	0.00000	0.17182	0.80468	0.00000	1.28866	0.00000
VTR	0.00000	0.06873	0.00000	0.00000	0.00000	0.00000
AT&T	19.83333	43.06842	16.63306	10.09934	25.00000	3.50000
DACOM	0.00000	0.13746	0.40323	0.33113	0.51546	0.00000
DGT	0.00000	0.06873	0.20161	0.00000	0.51546	0.00000
HKTI	0.00000	0.03436	0.10081	0.00000	0.25773	0.00000
HTC	0.00000	0.13746	0.20161	0.16556	0.25773	0.00000
IDC	0.00000	0.27491	0.80468	0.33113	0.51546	0.50000
ITDC	0.00000	0.20619	0.60345	0.82781	0.51546	0.50000
ITJ	0.00000	0.24065	0.80403	0.33113	0.51546	0.50000
KDD	0.00000	0.48110	1.00806	0.66225	0.77320	1.50000
KT	0.00000	0.24065	0.60484	0.49669	0.51546	0.50000
MCII	7.33333	11.10838	8.84677	3.97351	8.24742	1.00000
OPTUS	0.00000	0.03436	0.20161	0.00000	0.51546	0.00000
PLDT	0.00000	0.06873	0.20161	0.16556	0.25773	0.00000
SINGTEL	0.00000	0.00000	0.10081	0.00000	0.25773	0.00000
SPRINT	4.33333	8.05155	0.70565	0.33113	1.03093	0.50000
TELECOMM	2.83333	0.30929	0.60484	0.66225	0.51546	0.00000
TELMEX	30.00000	1.92440	4.03226	8.13245	1.54639	1.50000
TLGB	3.66667	1.37467	0.80484	0.33113	1.03093	0.00000
TRT/FTC	5.00000	0.48110	0.20161	0.16556	0.00000	0.50000
WCOM	0.00000	0.34364	0.00000	0.00000	0.00000	0.00000
TOTALS	100.00000	100.00000	100.00000	100.00000	100.00000	100.00000

*TLD's interests will be held in reserve.

SCHEDULE C-:
09-Oct-92

1. The percentages shown on Schedule C-2 for Segment T1 and Subsegment T2-1 are derived from the relevant Party's half MIU assignments in Schedule D-1 divided by two times the Notional Capacity of Schedule D-1.

2. The percentages shown on Schedule C-2 for Subsegments T2-2 and T3-1 are derived from the relevant Party's half MIU assignments in Schedule D-2 divided by two times the Notional Capacity of Schedule D-2.

3. The percentages shown on Schedule C-2 for Subsegment T3-2 are derived from the relevant Party's half MIU assignments in Schedules D-3, D-4 and D-5 divided by two times the Sum of the Notional Capacity of Schedule D-3, D-4 and D-5.

4. The percentages shown on Schedule C-2 for Subsegment T4-1 are derived from the relevant Party's half MIU assignments in Schedules D-3 and D-6 divided by two times the Notional Capacity of Schedules D-3 and D-6.

5. The percentages shown on Schedule C-2 for Segment T5 and Subsegment T4-2 are derived from the relevant Party's half MIU assignments in Schedule D-4 divided by two times the Notional Capacity of Schedule D-4.

6. The percentages shown on Schedule C-2 for Segment T6 are derived from the relevant Party's half MIU assignments in Schedules D-5 and D-6 divided by two times the Sum of the Notional Capacity of Schedules D-5 and D-6.

COLUMBUS II CABLE SYSTEM
QUANTITIES OF MIUS HELD JOINTLY BY THE PARTIES TO THIS AGREEMENT
BETWEEN CANCUN AND WEST PALM BEACH

WEST PALM BEACH PARTIES

CANCUN PARTIES	APTT	AT&T	BELGACOM	BT	CANTV	CODETEL	DBP-T	EMBRATEL	ENTEL	FT	ITC	MARCONI	MCI	NPTT	SPRINT	ST	TELECOM	TELECOMM	TELINTAR	TLD *	TLFN	TLGB	TRT/FTC	TOTAL
ANTEL(ES)	0	17	0	0	0	0	0	0	0	0	0	0	1	0	2	0	0	0	0	0	1	0	0	21
AT&T	0	4	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	4
CANTV	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
GUATEL	0	16	0	0	0	0	0	0	0	0	0	0	1	0	2	0	0	0	0	0	1	0	0	20
HONDUTEL	0	18	0	0	0	0	0	0	0	0	0	0	1	0	1	0	0	0	0	0	2	0	0	22
ICE	0	3	0	0	0	0	0	0	0	0	0	0	1	0	1	0	0	0	0	0	1	0	0	6
INTEL	0	4	0	0	0	0	0	0	0	0	1	0	2	0	2	0	0	0	0	0	1	0	0	10
ITC	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	1
TELCOR	0	3	0	0	0	0	0	1	0	0	0	0	1	0	1	0	0	0	0	0	1	1	0	8
TELECOMM	0	8	0	0	1	0	0	0	0	0	2	0	2	0	0	0	0	0	0	0	2	0	0	12
TELMEX	1	50	1	2	4	1	0	3	1	3	5	1	36	1	17	1	3	0	2	2	17	21	0	160
TRT/FTC	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	15	15
TOTALS	1	115	1	2	6	1	0	4	1	3	9	1	44	1	26	1	3	5	2	2	26	22	15	300

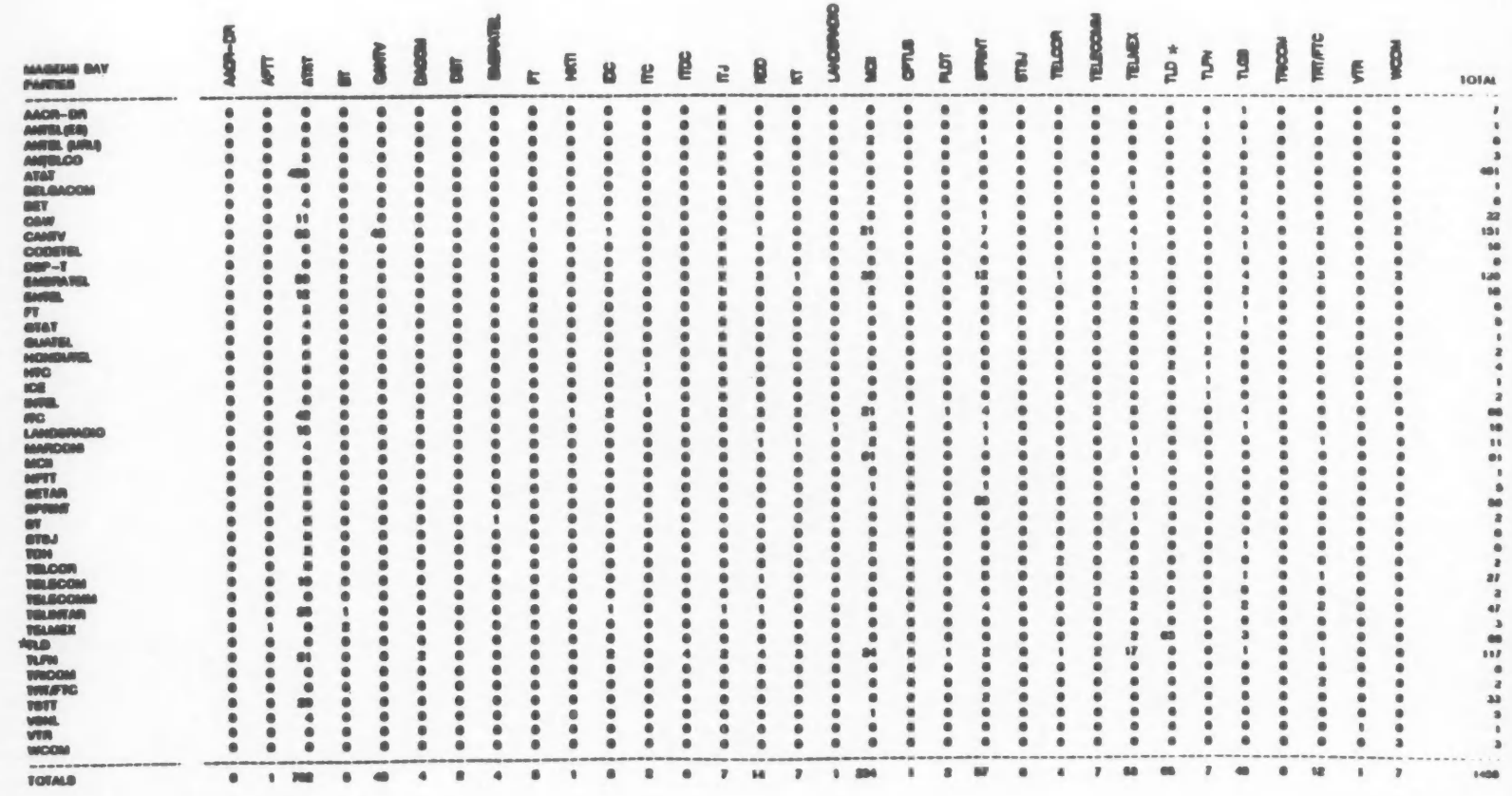
LD's interests will be held in reserve.

SCHEDULE D - 1
09-Oct-92

5274

COLUMBUS II CABLE SYSTEM
QUANTITIES OF MUS HELD JOINTLY BY THE PARTIES TO THIS AGREEMENT
BETWEEN WEST PALM BEACH, VERO BEACH AND MAGENS BAY

WEST PALM BEACH AND VERO BEACH PARTIES



*TLD's interests will be held in reserve.

SCHEDULE D - 2
09 - Oct - 92

COLUMBUS II CABLE SYSTEM
[illegible] ASSIGNED FOR JOINT USE BY THE PARTIES TO THIS [illegible]EMENT
BETWEEN MAGENS BAY AND SARDINA

MAGENS BAY PARTIES

SARDINA PARTIES	AACR-DR	ANTELSIR	ANTELAPAJ	ANTELCO	AT&T	CANTV	DSP-TEL	ENCOM	EMBRATEL	ENTEL	GUATEL	HONDUTEL	HTC	ICE	IDC	INTEL	ITDC	ITJ	IDD	KT	LANDSPACIO	MCI	PLDT	SETAR	SPRINT	TELCOR	TELECOM	TELECOMM	TELINTAR	TELMEX	TLD*	TLPN	TLSS	TRT/FTC	TOTAL
AACR-DR	4	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	4
AT&T	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2
BELGACOM	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	2
BT	0	0	0	0	0	1	0	0	2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	2	0	0	0	0	6
CANTV	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2
DSP-T	0	0	0	1	0	0	0	0	0	2	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	1	0	0	0	24
EMBRATEL	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
FT	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	1
NPTT	0	0	0	0	0	1	0	0	2	0	0	0	0	0	0	0	0	0	0	0	2	0	0	1	0	0	0	0	0	1	0	0	0	0	7
BT	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	2
TELECOMM	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	1
TLPN	0	1	2	1	24	10	3	2	5	0	1	2	1	1	2	1	4	2	4	3	0	24	1	0	2	1	5	2	14	17	3	10	2	1	100
TOTALS	4	1	2	2	25	10	3	2	21	0	1	2	1	1	2	1	5	2	4	3	3	24	1	1	2	1	5	3	22	31	4	10	2	1	252

*TLD's interests will be held in reserve.

SCHEDULE D-3
[illegible]-Oct-[illegible]

COLUMBUS II CABLE SYSTEM
MIUS ASSIGNED FOR JOINT USE BY THE PARTIES TO THIS AGREEMENT
BETWEEN MAGENS BAY AND PALERMO

MAGENS BAY PARTIES

PALERMO PARTIES	AACR-DR	ANTELURU	ANTELCO	AT&T	CANTV	CODETEL	DACOM	DGT	EMBRATEL	EMTEL	HKTI	HTC	IDC	INTEL	ITC	ITDC	ITJ	KDD	KT	LANDINGADO	MCI	OPTUS	PLDT	SINOTEL	SPRINT	TELECOM	TELECOMM	TELNTAR	TELMEX	TLDs	TLSB	TOTAL
APTT	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2
AT&T	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	24
CANTV	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	6
EMBRATEL	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	4
ITC	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	16
MCI	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	8
VSNL	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	8
TOTALS	1	1	1	73	16	1	8	8	14	8	1	1	8	1	4	8	8	8	8	1	37	8	1	1	4	8	8	10	8	1	4	101

*TLD's interests will be held in reserve.

5277

SCHEDULE D - 4
08-Oct-02

COLUMBUS II CABLE SYSTEM
MIUS ASSIGNED FOR JOINT USE BY THE PARTIES TO THIS AGREEMENT
BETWEEN MAGENS BAY AND FUNCHAL

MAGENS BAY PARTIES

FUNCHAL PARTIES	AACR-DR	AT&T	CANTV	EMBRATEL	KDD	KT	MARCONI	MCII	SPRINT	TELINTAR	TELMEX	TLD *	TRT/FTC	TOTAL
AACR-DR	1	0	0	0	0	0	0	0	0	0	0	0	0	1
AT&T	0	1	0	0	0	0	0	0	0	0	0	0	0	1
CANTV	0	0	2	0	0	0	0	0	0	0	0	0	0	2
DBP-T	0	0	0	2	0	0	0	0	0	0	0	0	0	2
EMBRATEL	0	0	0	1	0	0	0	0	0	0	0	0	0	1
FT	0	1	1	2	0	0	0	0	0	1	2	0	0	7
IDC	0	0	0	1	0	0	0	0	0	0	0	0	0	1
ITDC	0	0	0	1	0	0	0	0	0	0	0	0	0	1
ITJ	0	0	0	1	0	0	0	0	0	0	0	0	0	1
KDD	0	0	0	2	0	0	0	0	0	0	0	0	0	2
MARCONI	1	4	3	6	1	1	6	2	1	1	1	0	1	28
SPTT	0	0	0	2	0	0	0	0	0	0	0	0	0	2
* TLD	0	0	0	0	0	0	0	0	0	0	0	1	0	1
TOTALS	2	6	6	18	1	1	6	2	1	2	3	1	1	50

*TLD's interests will be held in reserve.

5278

SCHEDULE D-5
09-Oct-92

COLUMBUS II CABLE SYSTEM
MIUS ASSIGNED FOR JOINT USE BETWEEN
SARDINA AND FUNCHAL

FUNCHAL PARTIES

SARDINA PARTIES	MARCONI	TOTAL
MARCONI	50	50
TOTAL	50	50

NOTE: PLEASE REFER TO SCHEDULE E-4

SCHEDULE D-6
09-Oct-92

COLUMBUS II CABLE SYSTEM
ASSIGNMENT OF CAPACITY IN SEGMENT A
BETWEEN CANCUN AND WEST PALM BEACH

WEST PALM BEACH PARTIES

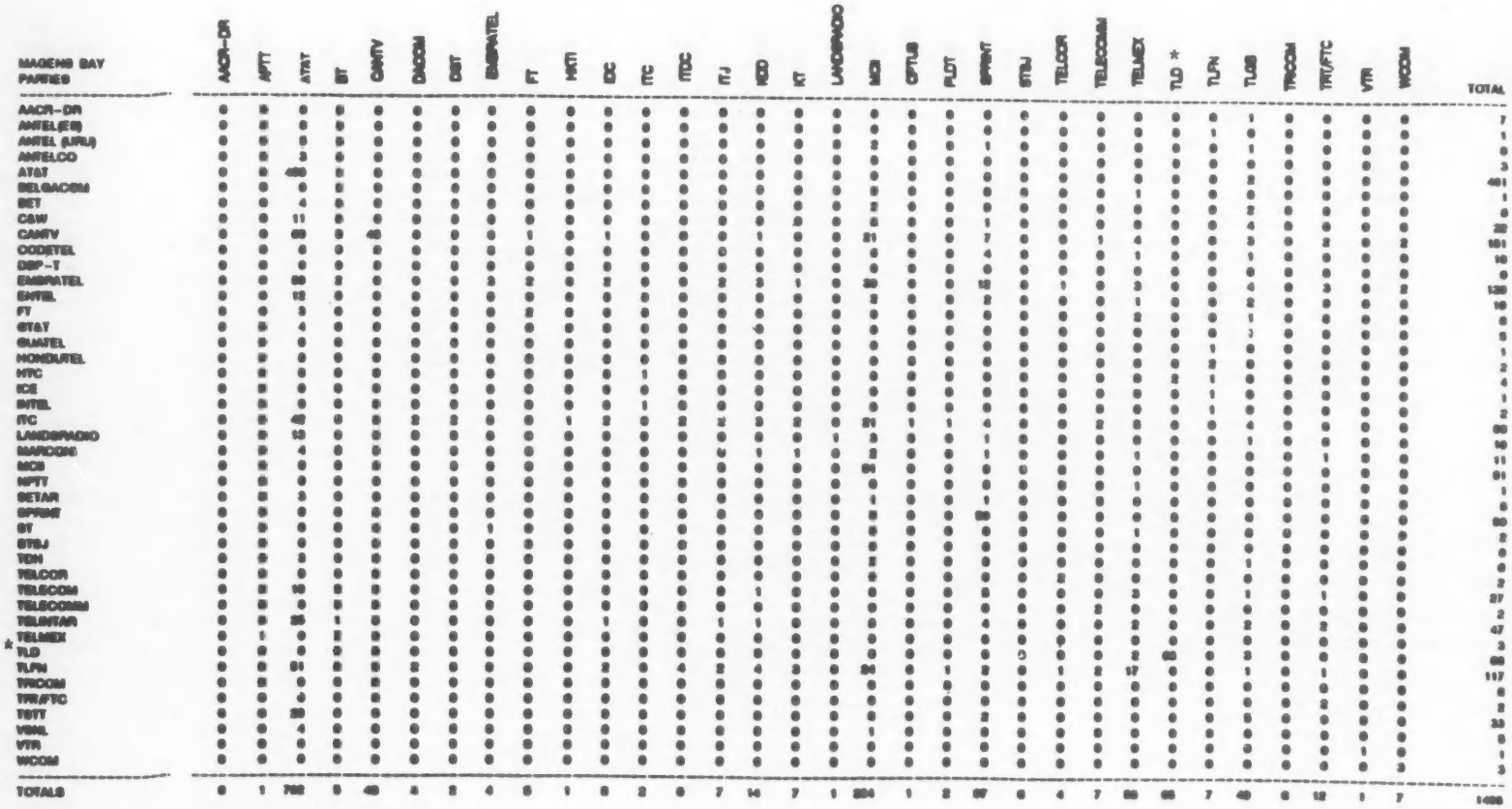
CANCUN PARTIES	APTT	AT&T	BELLSOUTH	BT	CANTV	CODETEL	DBP-T	EMBRATEL	ENTEL	FT	ITC	MARCONI	MCI	NPTT	SPRINT	ST	TELECOM	TELECOMM	TELINTAR	TLD*	TLPN	TLGB	TRT/FTC	TOTAL
ANTEL(ES)	0	17	0	0	0	0	0	0	0	0	0	0	1	0	2	0	0	0	0	0	1	0	0	21
AT&T	0	4	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	4
CANTV	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
GUATEL	0	16	0	0	0	0	0	0	0	0	0	0	1	0	2	0	0	0	0	0	1	0	0	20
HONDUTEL	0	18	0	0	0	0	0	0	0	0	0	0	1	0	1	0	0	0	0	0	2	0	0	22
ICE	0	3	0	0	0	0	0	0	0	0	0	0	1	0	1	0	0	0	0	0	1	0	0	6
INTEL	0	4	0	0	0	0	0	0	0	0	1	0	2	0	2	0	0	0	0	0	1	0	0	10
ITC	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	1
TELCOR	0	3	0	0	0	0	0	1	0	0	0	0	1	0	1	0	0	0	0	0	1	1	0	8
TELECOMM	0	0	0	0	1	0	0	0	0	0	2	0	2	0	0	0	0	5	0	0	2	0	0	12
TELMEX	1	80	1	2	4	1	0	3	1	3	5	1	35	1	17	1	3	0	2	2	17	21	0	180
TRT/FTC	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	15	15
TOTALS	1	115	1	2	6	1	0	4	1	3	9	1	44	1	26	1	3	5	2	2	26	22	15	300

*TLD's interests will be held in reserve.

SCHEDULE E-1
09-Oct-92

COLUMBUS II CABLE SYSTEM
ASSIGNMENT OF CAPACITY IN SEGMENT B
BETWEEN WEST PALM BEACH, VERO BEACH AND MAGENS BAY

WEST PALM BEACH AND VERO BEACH PARTIES

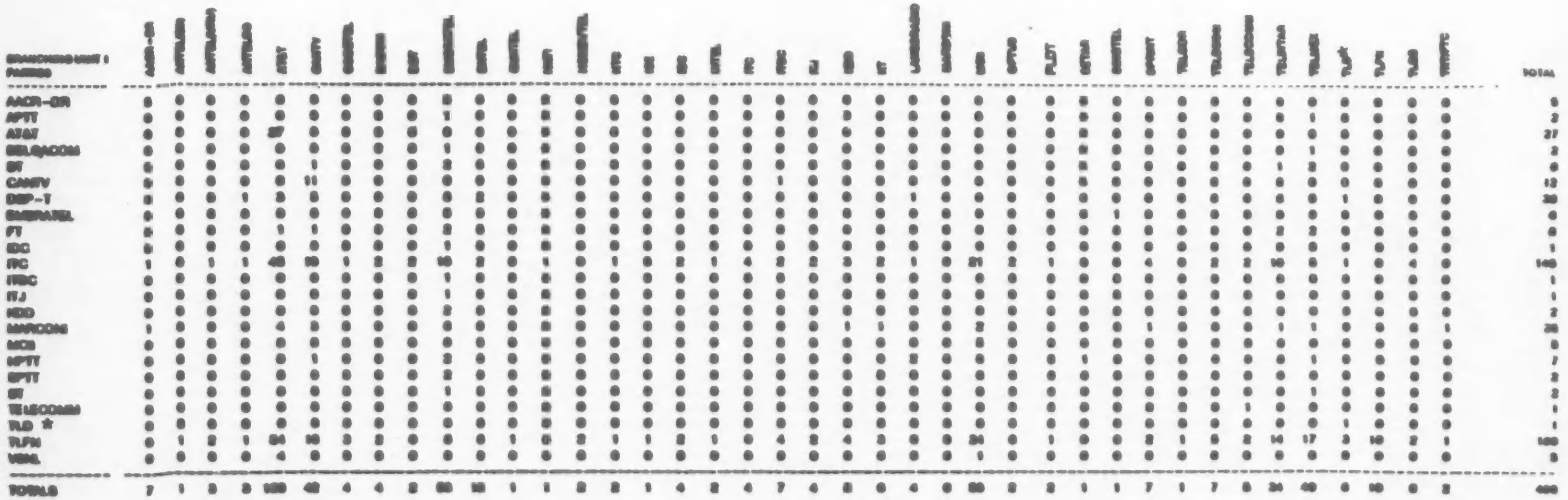


* TLD's interests will be held in reserve.

SCHEDULE E - 2
09-Oct-92

COLUMBUS II CABLE SYSTEM
ASSIGNMENT OF CAPACITY IN SUBSEGMENT C1
BETWEEN MAKENG BAY AND BRANCHING UNIT 1

MAKENG BAY PARTIES



*TLD's interests will be held in reserve.

SCHEDULE 6 - 3
09-Oct-02

COLUMBUS II CABLE SYSTEM
ASSIGNMENT OF CAPACITY IN SUBSEGMENT C2
BETWEEN BRANCHING UNIT 1 AND BARDINA

BRANCHING UNIT 1 PAIRS

BARDINA PAIRS	AACR-DR	AT&T	BELGACOM	BT	CANTV	DEP-T	EMBRATEL	FT	MARCONI	MPTT	ST	TELECOMM	TLPN	TOTALS
AACR-DR	4	0	0	0	0	0	0	0	0	0	0	0	0	4
AT&T	0	0	0	0	0	0	0	0	0	0	0	0	1	1
BELGACOM	0	0	0	0	0	0	0	0	0	0	0	0	2	2
BT	0	0	0	0	0	1	1	0	0	0	0	0	0	2
CANTV	0	0	0	0	0	1	0	0	0	0	0	0	0	2
DEP-T	0	0	0	1	0	1	0	0	0	0	0	0	0	2
EMBRATEL	0	0	0	0	0	0	1	0	0	0	0	0	0	1
FT	0	0	0	0	0	0	0	0	0	0	0	0	0	0
MARCONI	0	0	0	0	0	0	0	0	0	0	0	0	0	0
MPTT	0	0	0	0	0	1	1	0	0	0	0	0	0	2
ST	0	0	0	0	0	0	0	0	0	0	0	0	0	0
TELECOMM	0	0	0	0	0	0	0	0	0	0	0	0	0	0
TLPN	0	1	2	1	84	16	0	0	0	0	0	0	0	100
TOTALS	4	1	2	2	84	16	0	0	0	0	0	0	0	100

NOTE: THE MLIS ASSIGNED TO CPTM IN THIS SCHEDULE, E-4, CORRESPOND TO THE CAPACITY IN SCHEDULE D-6 AND ARE NOT DEPENDENT ON THE CAPACITY SHOWN ON SCHEDULE D-8. THE MLIS BETWEEN MAKENS SW AND FUNCHAL, AS SHOWN IN SCHEDULE D-8, SHALL NOT BE INCLUDED IN THE SCHEDULE, E-4.

*TLD's interests will be held in reserve.

COLUMBUS II CABLE SYSTEM
ASSIGNMENT OF CAPACITY IN SUBSEGMENT C3
BETWEEN BRANCHING UNIT 1 AND BRANCHING UNIT 2

BRANCHING UNIT 1 PARTIES

BRANCHING UNIT 2 PARTIES	AACR-DR	ANTILLARA	ANTILCO	AT&T	CANTV	EBSBTEL	EMBRATEL	ENTEL	FT	HTC	IDC	INTEL	ITC	ITDC	ITJ	KDD	KT	LANDINGCO	MARCOM	MCI	OPTUS	PLDT	SINTEL	SPRINT	TELECOM	TELECOM	TELMEX	TLD*	TLSB	WILTEC	TOTAL
AACR-DR	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
APTT	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	2
AT&T	0	0	0	16	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	25
CANTV	0	0	0	0	10	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	10
EBS-T	0	0	0	1	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2
EMBRATEL	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	5
FT	0	0	0	1	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	1	0	0	0	7
IDC	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
ITC	1	1	1	16	0	1	0	0	0	1	0	0	4	2	2	3	2	1	0	21	2	1	1	4	2	2	0	0	0	0	100
ITDC	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
ITJ	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
KDD	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2
MARCOM	1	0	0	4	0	0	0	0	0	0	0	0	0	0	0	1	1	0	82	2	0	0	0	1	0	0	1	0	0	1	104
MCB	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
SPTT	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	2
TLD*	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	1
VSNL	0	0	0	4	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	5
TOTALS	3	1	1	70	26	1	2	2	32	2	1	1	2	1	4	2	2	4	3	1	82	29	2	1	1	5	2	2	12	0	2	4	1	320

*TLD's interests will be held in reserve.

SCHEDULE E-3
09-Oct-92

COLUMBUS II CABLE SYSTEM
ASSIGNMENT OF CAPACITY IN SUBSEGMENT C4
BETWEEN BRANCHING UNIT 2 AND PALERMO

BRANCHING UNIT 2 PARTIES

PALERMO PARTIES	AMCR-CR	ANTEL(UFU)	ANTELCO	AT&T	CANTV	CODETEL	DACOM	DST	EMBRATEL	ENTEL	HKTI	HTC	IDC	INTEL	ITC	ITDC	ITJ	KDD	KT	LANDSRADIO	MCI	CPTUS	PLDT	SINGTEL	SPRINT	TELECOM	TELECOMM	TELINTAR	TELMEX	TLD *	TLSS	TOTAL
APTT	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	2
AT&T	0	0	0	24	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	24
CANTV	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
EMBRATEL	0	0	0	0	0	0	0	0	3	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	4
ITC	1	1	1	45	10	1	2	2	10	2	1	1	2	1	4	2	2	3	2	1	21	2	1	0	4	2	2	10	5	1	4	140
MCII	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	5	0	0	0	0	0	0	0	0	0	0	5
VSNL	0	0	0	4	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	5
TOTALS	1	1	1	73	10	1	2	2	14	2	1	1	2	1	4	2	2	3	2	1	27	2	1	1	4	2	2	10	6	1	4	184

*TLD's interests will be held in reserve.

SCHEDULE E-6
09-Oct-92

COLUMBUS II CABLE SYSTEM
ASSIGNMENT OF CAPACITY IN SUBSEGMENT C5
BETWEEN BRANCHING UNIT 2 AND FUNCHAL

BRANCHING UNIT 2 PARTIES

FUNCHAL PARTIES	AACR-DR	AT&T	CANTV	EMBRATEL	KDD	KT	MARCONI	MCII	SPRINT	TELINTAR	TELMEX	TLD*	TRT/FTC	TOTAL
AACR-DR	1	0	0	0	0	0	0	0	0	0	0	0	0	1
AT&T	0	1	0	0	0	0	0	0	0	0	0	0	0	1
CANTV	0	0	2	0	0	0	0	0	0	0	0	0	0	2
DBP-T	0	0	0	2	0	0	0	0	0	0	0	0	0	2
EMBRATEL	0	0	0	1	0	0	0	0	0	0	0	0	0	1
FT	0	1	1	2	0	0	0	0	0	1	2	0	0	7
IDC	0	0	0	1	0	0	0	0	0	0	0	0	0	1
ITDC	0	0	0	1	0	0	0	0	0	0	0	0	0	1
ITJ	0	0	0	1	0	0	0	0	0	0	0	0	0	1
KDD	0	0	0	2	0	0	0	0	0	0	0	0	0	2
MARCONI	1	4	3	6	1	1	208	2	1	1	1	0	1	230
SPTT	0	0	0	2	0	0	0	0	0	0	0	0	0	2
TLD *	0	0	0	0	0	0	0	0	0	0	0	1	0	1
TOTALS	2	6	6	18	1	1	208	2	1	2	3	1	1	252

*TLD's interests will be held in reserve.

SCHEDULE E-7
09-Oct-92

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY
GTE HAWAIIAN TELEPHONE
COMPANY INCORPORATED
MCI INTERNATIONAL, INC.
SPRINT COMMUNICATIONS COMPANY
LIMITED PARTNERSHIP
TELEFONICA LARGA DISTANCIA
DE PUERTO RICO
THE ST. THOMAS AND SAN JUAN
TELEPHONE COMPANY, INC.
TRT/FTC COMMUNICATIONS, INC.
WORLD COMMUNICATIONS, INC.

File No. ITC-93-030

Joint Application for Authorization Under Section 214 of the Communications Act of 1934, as Amended, to Construct, Acquire Capacity in and Operate a High Capacity Digital Submarine Cable System Between and Among the United States Mainland, U.S. Virgin Islands, Brazil, Trinidad and Venezuela

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: July 13, 1993; Released: July 28, 1993

By the Acting Chief, Common Carrier Bureau:

1. On November 10, 1992, eight United States international service carriers (hereinafter referred to as Joint Applicants)[1] filed the above captioned Joint Application requesting authority pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214 (1982), to construct and operate a high capacity digital submarine cable system, known as the AMERICAS-1 Cable System, extending from the U.S. mainland to the U.S. Virgin Islands (U.S.V.I.), then to a branching unit which extends to both Brazil and Trinidad and then to Venezuela. Segments of the AMERICAS-1 Cable System operating between the U.S. mainland and the U.S.V.I. will be used in tandem with corresponding segments on the COLUMBUS II Cable System (FCC File Nos. SCL-93-001, ITC-93-029), permitting the balancing of traffic and sharing of restoration capabilities between the two cable systems. These combined segments will be known as the "Common Segment."[2]

2. The Joint Application was placed on public notice on November 18, 1992. No comments were received. On March 12, 1993, AT&T filed a letter requesting the Commission to bifurcate the proceeding, and consider TLD's ownership interest apart from the other Joint Applicants.[3] TLD opposed AT&T's request, and AT&T responded. On May 7, 1993, the Commission, in a public notice, requested additional comments on AT&T's request. MCII and TLD filed comments, and AT&T and TLD filed reply comments. For the reasons discussed below, we partially grant the Joint Application.[4]

3. The proposed AMERICAS-1 Cable System consists of seven segments.[5] The Common Segments B and N will be comprised of 2 fiber pairs, each employing AT&T's latest SL2000 technology, operating at 2.4 Gigabits per second (Gbps). One fiber pair in each segment will be used for service while the other will be used for restoration. Segment S will employ technology operating at 560 Megabits per second (Mbps). All of the fiber pairs in Segment S will

[1] The Joint Applicants include American Telephone and Telegraph Company (AT&T), GTE Hawaiian Telephone Company Incorporated (HTC), MCI International, Inc. (MCII), Sprint Communications Company Limited Partnership (Sprint), Telefonica Larga Distancia de Puerto Rico (TLD), The St. Thomas and San Juan Telephone Company, Inc. (STSJ), TRT/FTC Communications, Inc. (TRT/FTC), and World Communications, Inc. (Worldcom).

[2] *See infra* n.5.

[3] Letter from Elaine R. McHale, Senior Attorney for AT&T, to Donna Searcy, Secretary of the FCC, dated March 12, 1993. AT&T's letter referenced a previously filed request by Sprint on January 19, 1993 that the Commission consider in future proceedings involving TLD both the general issue of reciprocal entry rights, and the issue of how Spain's treatment of U.S. carriers may affect grant of additional Section 214 authority to Spanish-owned carriers.

[4] In a companion order, we grant the Joint Applicants' request for a cable landing license (File No. S-C-L-93-002, DA 93-909, adopted July 13, 1993).

[5] The Joint Application identifies these as: Segments T1, T2, T3, T4 and T5, which are, respectively, the cable station at Vero Beach, Florida; the cable station at Magens Bay, St. Thomas, U.S.V.I.; the cable station at Macqueripe, Trinidad; the cable station at Camuri, Venezuela; and the cable station at Fortaleza, Brazil; Segment N -- the submarine cable linking Segments T1 and T2; and Segment S -- the submarine cables linking Segments T2, T3, T4, and T5.

The portions of AMERICAS-1 and COLUMBUS II identified as the Common Segment are: (a) AMERICAS-1 -- Segments N, T1 and part of T2; (b) COLUMBUS II -- Segment B, and parts of Segments T2 and T3 of that system (*see* COLUMBUS II Section 214 authorization, DA 93-910, adopted July 13, 1993, for description of COLUMBUS II segments); and (c) Segment L, a terrestrial fiber optic cable linking the Vero Beach (AMERICAS-1) and West Palm Beach (COLUMBUS II) cable stations. Because Segment L consists of a domestic facility, the Joint Applicants do not include it for purposes of authorization as belonging to either the AMERICAS-1 or COLUMBUS II Cable Systems.

be active, with none reserved for restoration. Subsegments S1 and S2, between St. Thomas and the Branching Unit (BU), and the BU and Macqueripe, respectively, will consist of three fiber pairs. Subsegments S3 and S4, between Macqueripe and Camuri, and the BU and Fortaleza, respectively, will consist of two fiber pairs.

4. The Design Capacity of the AMERICAS-1 Cable System Segments N and S is as follows:

SEGMENT OR SUBSEGMENT	NUMBER OF BASIC MODULES[6] SYSTEM	NUMBER OF MIUs[7] (DESIGN)	NUMBER OF 64 kbps VOICE PATHS
N	32	2016	60,480
S1	12	756	22,680
S2	12	756	22,680
S3	8	504	15,120
S4	8	504	15,120

5. *Public Interest Determination.* Section 214 of the Communications Act requires that the Commission make a finding that the public convenience and necessity will be served by authorization of the facilities requested in the Joint Application by determining "whether the specific facility chosen and the use to be made of that facility are required by the public convenience and necessity."[8] In making this determination, the Commission traditionally has considered such factors as demand, cost, media and route diversity, restoration, intramodal and intermodal competition, technological innovations and international comity.[9] After reviewing these factors in relation to this cable system, we conclude that projected circuit demand as supplied by the Joint Applicants, along with other factors, supports the construction and operation of AMERICAS-1 to meet the telecommunications needs of the Joint Applicants and their correspondents in the Caribbean Region during the 1994-2010 time frame. We conclude that the introduction of AMERICAS-1 as proposed will enhance media and route diversity by adding another independent cable route. A comparison of the costs for previously authorized digital cable facilities in the Caribbean Region demonstrates that AMERICAS-1 will continue the trend of providing increased capacity while reducing per circuit costs. The proposed AMERICAS-1 Cable System will introduce significant technological developments into the submarine cable field which in turn will provide substantial benefits to users. In addition, the introduction of AMERICAS-1 will enhance intramodal competition in the Caribbean Region and encourage both private and common carrier cable operators to innovate and price their offerings in a manner that is calculated to attract and retain customers. We also find that the introduction of AMERICAS-1 will increase intermodal competition with INTELSAT and separate satellite system providers, spurring existing providers of both cable and satellite capacity to respond competitively. Finally, with over fifty telecommunications administrations and entities from forty-one foreign locations participating in AMERICAS-1, we conclude that AMERICAS-1 will promote international comity.

6. *TLD's Ownership Interest.* AT&T argues that the circumstances associated with TLD's participation in the AMERICAS-1 and COLUMBUS II Cable Systems have materially changed since the Joint Applications were filed. Since that time, TLD has been acquired by Telefonica de Espana, the monopoly provider of telecommunications services in Spain.[10] AT&T states these circumstances present complex and novel issues[11] requiring careful analysis, yet do not affect the issues or the public interest insofar as participation in these cable projects by the remaining Joint Applicants is concerned. Moreover, AT&T states that granting the applications of the Joint Applicants other than TLD while the Commission evaluates the issues attendant to TLD's ownership will avoid the risk of increases in the cable systems' costs that would likely accompany a delay in the Commission authorization. AT&T states that capacity assigned to TLD could be held in reserve for such time as necessary until the Commission renders a decision as to TLD's participation. The cable system ownership schedules would be appropriately modified to reflect such treatment. If TLD were later permitted to participate, the capacity set aside would be available to TLD at the same cost and terms as available to the other original owners of the systems. Conversely, if TLD is not permitted to participate, any payments it made would be refunded to it at no financial penalty. AT&T believes that the impact of bifurcation upon the cable projects would be minimal, and no different from the impact of the addition or withdrawal of owners that typically occurs during the time period when Construction and Maintenance Agreements (C&MA) are being executed or amended.

7. MCII states that, if the Commission determines it must review either the regulatory conditions imposed by the *TLD Order* and/or reciprocity issues, such matters should be addressed in a separate proceeding so as to avoid delay in the authorization of these cable systems. MCII suggests the Commission condition TLD's cable authorization subject to the outcome of such a proceeding. However, MCII opposes actions by the Commission, such as not granting authorization for all applicants, that would prevent one or more U.S. applicants from competing with other U.S. applicants on a level playing field. MCII states that delaying a carrier's authorization could harm customers of the carrier and the carrier's business if customers perceive a delay to be a business risk and take business elsewhere. In addition, MCII argues a delay could signal foreign correspondents that cable systems with heavy U.S. participation are invest-

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[6] The Basic System Modules (BSM) operate at 140 Mbps, with each BSM consisting of 63 Minimum Investment Units (MIUs).

[7] A MIU is the minimum unit of investment for ownership in the AMERICAS-1 Cable network, allowing the use of 2.048 Mbps and the additional approximately 421 kilobits per second (kbps) required for multiplexing in each direction. Each MIU includes thirty 64 kbps voice paths. For voice services, digital circuit multiplication equipment (DCME) can be employed to derive about 150 virtual voice paths from a MIU.

[8] *See AT&T et al.*, (*TAT-7 Order*), 73 FCC 2d 248, 256 (1979).

[9] *See, e.g., AT&T et al.* 4 FCC Rcd 1129, 1131 (Com. Car. Bur. 1988) (*TAT-9 Order*). *See also Policies to be Followed in the Authorization of Common Carrier Facilities to Meet Pacific Telecommunications Needs during the Period 1981-1985 (POR Planning)*, 102 FCC 2d 353, 355 (1985) and *North Atlantic (Facilities Planning*, 3 FCC Rcd 3979, 3986 (1988); *All America Cable and Radio Inc., et. al.*, 67 FCC 2d 451, 469 (1978).

[10] *See Telefonica Larga Distancia de Puerto Rico et. al.*, 8 FCC Rcd 106 (1992)(*TLD Order*).

[11] AT&T states TLD's ownership raises issues of unfair and unequal international market access, potential market abuse by a foreign monopoly carrier, self-correspondency, above-cost accounting rates, and violation of reciprocity requirements of the Cable Landing License Act.

ment risks due to possible delays in the U.S. regulatory approval process. MCII is concerned that if potential investors are wary, they could be deterred from investing upfront in common carrier cables.

8. In response, TLD states that not only is bifurcation unnecessary, it will harm TLD in relation to its competitors, especially AT&T, in dealing with foreign correspondents, implementing its strategic plans and concluding new plans with correspondents through the life of the cable systems. TLD argues AT&T has failed to demonstrate why the safeguards of the *TLD Order* are not fully adequate to protect U.S. competitors in this situation. In addition, TLD argues AT&T has failed to establish factually how TLD's minimal ownership of facilities connecting with Spain might result in anticompetitive actions which will benefit TLD to the detriment of other U.S. carriers. TLD argues AT&T's goal is only to enlarge its competitive edge over TLD by subjecting it to delay. TLD states the Commission has already determined that it can resolve facilities-based applications by the U.S. affiliate of a foreign carrier without further lengthy policy or rulemaking proceedings. .

9. Upon review of the application, we find that the grant of Section 214 authority to the Joint Applicants, except for TLD, to construct and operate the AMERICAS-1 Cable System will serve the public interest. The cable system will provide much needed connectivity with other digital cable systems in the region, thereby increasing service reliability. Because of the increased connectivity provided by the AMERICAS-1 Cable System, both route and path diversity will be increased and the Joint Applicants will be able to utilize restoration alternatives that are not presently available.

10. However, after reviewing the record, we conclude that TLD's proposed ownership interest raises complex and novel issues that require Commission consideration. These issues involve international market access, self-correspondency, and the reciprocity requirements of the Cable Landing License Act. We do not believe that it would be in the interest of any party to delay authorization of the cable pending resolution of these issues. Therefore, we defer granting TLD Section 214 authority to participate in the construction and operation of the AMERICAS-1 Cable System until the Commission has determined in a separate proceeding that it is in the public interest to allow TLD to participate. The capacity assigned to TLD shall be held in reserve, and any payments it has made held in an interest bearing account, for such time as necessary until the Commission renders a decision as to TLD's participation. The cable system ownership schedules shall be appropriately modified to reflect such treatment. If TLD is later permitted to participate, the capacity set aside shall be made available to TLD at the same cost and terms as are available to the other original owners of the systems. Conversely, if TLD is not permitted to participate, any payments it has made shall be refunded to it with interest, and without financial penalties.

11. Accordingly, IT IS ORDERED that pursuant to Section 214 of the Communications Act, as amended, Joint Application File No. I-T-C-93-030 IS PARTIALLY GRANTED, subject to the following terms, conditions, and limitations, and the Joint Applicants, except for TLD, are authorized to:

(a) participate in the construction and operation of the AMERICAS-1 Cable System as described in the Joint Application;

(b) acquire and activate capacity in the AMERICAS-1 Cable System, on an ownership basis, in accordance with the interests indicated in Appendix A;

(c) acquire capacity, by lease, in such connecting facilities as may be required to extend capacity in the AMERICAS-1 Cable System to certified points;

(d) utilize digital circuit multiplication equipment to derive additional voice paths from the circuits (MIUs) authorized herein, in accordance with the appropriate Commission authorizations; and

(e) activate and operate capacity in the AMERICAS-1 Cable System and aforementioned extension facilities for the provision of the Joint Applicants' authorized telecommunications services to certified points.

12. IT IS FURTHER ORDERED, that Joint Applicants are authorized to acquire, by lease, appropriate connecting facilities between the Vero Beach, Florida and Magens Bay, St. Thomas cable stations and their respective operating offices in the United States, Puerto Rico and the U.S. Virgin Islands.

13. IT IS FURTHER ORDERED that the capacity assigned to TLD shall be held in reserve until such time that a determination is made in a separate proceeding as to TLD's authorized level of participation. The cable system ownership schedules shall be appropriately modified to reflect such treatment. If TLD is later permitted to participate, the capacity set aside shall be made available to TLD at the same cost and terms as available to the other original owners of the systems. Conversely, if TLD is not permitted to participate, any payments it has made shall be refunded to it with interest, and without financial penalties.

14. IT IS FURTHER ORDERED that the Joint Applicants' tariffs must state that their customers may not resell international private lines or connect them to the public switched network for the provision of international basic telecommunications services, unless authorized to do so by the Commission upon a country-specific finding of resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending.*

15. IT IS FURTHER ORDERED that the Joint Applicants shall make available half-interests in AMERICAS-1 capacity to such present and future U.S. carriers as may be authorized by the Commission to acquire such capacity.

16. IT IS FURTHER ORDERED that the Commission retains jurisdiction to reallocate U.S. carriers' interest in capacity herein authorized, as the public interest may require and with any requisite concurrence of the foreign administration or carriers concerned, in order to accommodate additional carriers or for other reasons.

17. IT IS FURTHER ORDERED that the Commission retains jurisdiction over all matters relating to the Joint Applicants' ownership, management, maintenance and operation of the cable system as authorized herein to ensure the most efficient use not only of this cable system but of all means of communications between the United States and the Caribbean Region.

18. IT IS FURTHER ORDERED that the Commission retains jurisdiction to review the DCME, multiplexing and interworking arrangements and attribution of the costs thereof and to require such changes in the provision of these services and equipment as may be necessary.

19. IT IS FURTHER ORDERED that no Joint Applicant that is a dominant carrier pursuant to the Commission's decision in CC Docket No. 85-107 or CC Docket No. 91-360[12] shall either dispose of any interest in AMERICAS-1 capacity it is authorized to acquire to any entity on an ownership basis or dispose of any interest in any such capacity in any way to a non-U.S. telecommunications service provider without prior authorization by the Commission.

20. IT IS FURTHER ORDERED that the Joint Applicants shall include AMERICAS-1 facility use in the monthly Circuit Status Reports filed pursuant to the Commission's Orders. These reports shall be filed no later than the 20th day of each month providing the information for the preceding month.

21. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief, Common Carrier Bureau

[12] *See International Competitive Carrier*, 102 FCC 2d 812, 822 (1985); *International Services Order*, 7 FCC Rcd 7331 (1992).

VOTING INTERESTS IN THE AMERICAS 1 CABLE SYSTEM

PARTIES		PERCENT
AACR-DR	(Dominican Republic)	0.48520
ANTEL(ES)	(El Salvador)	0.01102
ANTEL(URU)	(Uruguay)	0.86061
ANTELCO	(Paraguay)	0.40591
APTT	(Austria)	0.07054
AT&T		25.06002
BELGACOM	(Belgium)	0.07054
BET	(Barbados)	0.11474
C&W	(UK)	0.24240
CANTV	(Venezuela)	17.94668
CODETEL	(Dominican Republic)	0.42863
DACOM	(Korea)	0.04407
DBP-T	(Germany)	1.50018
EMBRATEL	(Brazil)	13.16775
ENTEL	(Chile)	2.11708
FT	(France)	0.63006
GT&T	(Guyana)	0.20707
GUATEL	(Guatemala)	0.01102
HKTI	(Hong Kong)	0.01102
HONDUTEL	(Honduras)	0.02204
HTC		0.04407
IDC	(Japan)	0.38382
INTEL	(Panama)	0.02204
ITC	(Italy)	3.11608
ITDC	(Taiwan)	0.18882
ITJ	(Japan)	0.38382
KDD	(Japan)	0.58411
KT	(Korea)	0.13885
LANDSRADIO	(Curacao)	1.30804
MARCONI	(Portugal)	0.72486
MCI		7.88882
NPTT	(Netherlands)	0.38884
OPTUS	(Australia)	0.01102
PLDT	(Philippines)	0.02205
SETAR	(Aruba)	0.20705
SINGTEL	(Singapore)	0.02202
SPRINT		3.46880
SPTT	(Switzerland)	0.11884
ST	(Sweden)	0.14108
STSJ		0.13882
TDH	(Haiti)	0.08811
TELCOR	(Nicaragua)	0.13888
TELECOM	(Colombia)	0.46847
TELINTAR	(Argentina)	5.58875
TELMEX	(Mexico)	1.16000
TLD*		1.73838
TLFN	(Spain)	3.84880
TLGS	(Canada)	1.46888
TRICOM	(Dominican Republic)	0.13882
TRT/FTC		0.58885
TSTT	(Trinidad)	1.62138
VSNL	(India)	0.05809
VTR	(Chile)	0.14108
WCOM		0.34821
TOTAL		100.00000

*TLD's interests will be held in reserve.

NOTES:

THE PERCENTAGES SHOWN ARE BASED UPON A WEIGHTED AVERAGE OF PERCENTAGES SHOWN ON SCHEDULE C MULTIPLIED BY EACH SEGMENT COST AND THEN DIVIDED BY THE TOTAL CABLE SYSTEM COST.

FOR THE PURPOSES OF THIS AGREEMENT, TOCI SHALL OWN AND BE RESPONSIBLE FOR THE PERCENTAGE OF CAPITAL, OPERATING, AND MAINTENANCE COSTS LISTED AGAINST AT&T, FOR THAT PORTION OF SEGMENTS N AND S OF THE AMERICAS 1 CABLE SYSTEM WITHIN BRAZIL, TRINIDAD, AND VENEZUELA AND THAT PORTION OF THE TERRITORIAL WATERS THROUGH WHICH THE CABLE SYSTEM TRAVERSES. AT&T SHALL OWN AND BE RESPONSIBLE FOR THE CAPITAL, OPERATING, AND MAINTENANCE COSTS OF THE REMAINDER OF THE PERCENTAGE OF SEGMENTS N AND S.

OWNERSHIP IN SEGMENTS N, B, AND S,
ALLOCATION OF CAPITAL, OPERATING, AND MAINTENANCE COSTS
OF SEGMENTS N, B, S, AND L OF THE AMERICAS 1 AND COLUMBUS II CABLE SYSTEMS

*TLD's interests will be held reserve.

PARTIES	SEGMENTS N,B,L (PERCENT)	SEGMENT S SUBSEGMENT S1 (PERCENT)	SEGMENT S SUBSEGMENT S2 (PERCENT)	SEGMENT S SUBSEGMENT S3 (PERCENT)	SEGMENT S SUBSEGMENT S4 (PERCENT)
AACR-DR	0.45045	0.51613	0.60361	1.23967	0.00000
ANTEL(ES)	0.03466	0.00000	0.00000	0.00000	0.00000
ANTEL(URU)	0.31186	1.03627	0.45181	0.00000	1.92926
ANTELCO	0.10396	0.51613	0.15060	0.00000	0.96463
APTT	0.03466	0.08836	0.00000	0.00000	0.16077
AT&T	43.41662	17.18481	17.92170	14.88845	16.39871
BELGACOM	0.03466	0.08836	0.00000	0.00000	0.16077
BET	0.27720	0.00000	0.00000	0.20661	0.00000
C&W	0.76230	0.00000	0.00000	0.00000	0.00000
CANTV	8.88636	23.14335	40.96386	57.23140	0.64309
CODETEL	0.62370	0.34642	0.45181	0.61983	0.16077
DACOM	0.13860	0.00000	0.00000	0.00000	0.00000
DBP-T	0.31186	1.98618	1.36842	1.23967	2.73312
EMBRATEL	4.22730	15.97582	5.72289	0.61983	30.22508
ENTEL	0.95536	2.50432	1.05422	0.20661	4.82315
FT	0.45045	0.68095	0.45181	0.41322	0.96463
GT&T	0.17325	0.43178	0.75301	0.00000	0.00000
GUATEL	0.03466	0.00000	0.00000	0.00000	0.00000
HKTI	0.03466	0.00000	0.00000	0.00000	0.00000
HONDUTEL	0.08930	0.00000	0.00000	0.00000	0.00000
HTC	0.13860	0.00000	0.00000	0.00000	0.00000
IDC	0.27720	0.43178	0.15060	0.20661	0.64309
INTEL	0.08930	0.00000	0.00000	0.00000	0.00000
ITC	3.32640	3.02245	1.96783	2.06612	3.85852
ITDC	0.20790	0.17271	0.15060	0.20661	0.16077
ITJ	0.27720	0.43178	0.15060	0.20661	0.64309
KDD	0.46510	0.60449	0.30120	0.20661	0.96463
KT	0.24255	0.08836	0.00000	0.00000	0.16077
LANDSRADIO	0.69300	1.46808	2.71084	3.92562	0.16077
MARCONI	0.38116	0.86356	0.60241	0.61983	1.12540
MCII	11.26126	8.30387	8.03410	5.16529	6.75241
NPTT	0.03466	0.51613	0.60241	0.82646	0.32154
OPTUS	0.03466	0.00000	0.00000	0.00000	0.00000
PLDT	0.10396	0.00000	0.00000	0.00000	0.00000
SETAR	0.17325	0.51613	0.60361	1.23967	0.00000
SINGTEL	0.00000	0.08836	0.00000	0.00000	0.16077
SPRINT	5.09356	2.59057	2.40964	1.85950	3.05486
SPTT	0.00000	0.17271	0.00000	0.00000	0.32154
ST	0.08930	0.17271	0.00000	0.00000	0.32154
STSJ	0.41580	0.00000	0.00000	0.00000	0.00000
TDH	0.20790	0.00000	0.00000	0.00000	0.00000
TELCOR	0.20790	0.08836	0.00000	0.00000	0.16077
TELECOM	0.89886	0.25907	0.45181	0.61983	0.00000
TELINTAR	1.89390	6.80846	1.80723	0.20661	13.02251
TELMEX	1.57110	0.86356	0.60241	0.82646	0.96463
TLD*	4.60846	0.43178	0.60241	0.61983	0.16077
TLFN	4.19886	3.54089	2.40964	2.06612	4.98392
TLQB	1.42065	1.94078	1.80723	0.82646	1.44695
TRICOM	0.41580	0.00000	0.00000	0.00000	0.00000
TRT/FTC	0.46510	0.60449	0.30120	0.41322	0.80386
TSTT	1.14345	3.19516	5.57229	1.03306	0.00000
VSNL	0.17325	0.00000	0.00000	0.00000	0.00000
VTR	0.08930	0.17271	0.00000	0.00000	0.32154
WCOM	0.34660	0.34642	0.30120	0.41322	0.32154
TOTAL	100.00000	100.00000	100.00000	100.00000	100.00000

NOTES:

PERCENTAGES SHOWN FOR SEGMENTS N, B, AND L ARE DERIVED FROM THE RELEVANT PARTY'S HALF INTERESTS IN MIU ASSIGNMENTS IN SCHEDULE D1 DIVIDED BY TWO TIMES THE NOTIONAL CAPACITY OF D1
PERCENTAGES SHOWN FOR SEGMENT S1 ARE DERIVED FROM THE RELEVANT PARTY'S HALF INTERESTS IN MIU ASSIGNMENTS IN SCHEDULE D2 DIVIDED BY TWO TIMES THE NOTIONAL CAPACITY OF D2
PERCENTAGES SHOWN FOR SEGMENT S2 ARE DERIVED FROM THE RELEVANT PARTY'S HALF INTERESTS IN MIU ASSIGNMENTS IN SCHEDULE D3 DIVIDED BY TWO TIMES THE NOTIONAL CAPACITY OF D3
PERCENTAGES SHOWN FOR SEGMENT S3 ARE DERIVED FROM THE RELEVANT PARTY'S HALF INTERESTS IN MIU ASSIGNMENTS IN SCHEDULE D4 DIVIDED BY TWO TIMES THE NOTIONAL CAPACITY OF D4
PERCENTAGES SHOWN FOR SEGMENT S4 ARE DERIVED FROM THE RELEVANT PARTY'S HALF INTERESTS IN MIU ASSIGNMENTS IN SCHEDULE D5 DIVIDED BY TWO TIMES THE NOTIONAL CAPACITY OF D5

QUANTITIES OF MHS JOINTLY HELD BY THE PARTIES TO THIS AGREEMENT BETWEEN WEST PALM BEACH, VERO BEACH AND IMAGENS BAY

SEGMENT N OF AMERICAS I AND SEGMENT S OF COLUMBUS II

CORRESPONDENT PARTIES (JOINTLY OR WHOLLY HELD INTERESTS)

*TLD's interests will be held in reserve.

	ALL PARTIES	(A) AACR-DR	(B) APTT	(C) AT&T	(D) CANTV	(E) DACOM	(F) EMBRATEL	(G) FT	(H) HKTI	(I) IDC	(J) ITC	(K) ITDC	(L) KJJ	(M) KDD	(N) KT	(O) LANDSRADIO	(P) MCII	(Q) PLDT	(R) SPRINT	(S) STBJ	(T) TELCOR	(U) TELMEX	(V) TLD	(W) TLFN	(X) TLGB	(Y) WACOM	(Z) WAT/FTC	(AA) VTR	(AB) WCOM	(AC) TOTAL
1	AACR-DR	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	7
2	ANTEL (ES)	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	1
3	ANTEL (URU)	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2	0	1	0	0	0	0	0	1	0	0	0	0
4	ANTELCO	0	0	3	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	3
5	APTT	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
6	AT&T	0	0	488	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2	0	0	0	0	491
7	BELGACOM	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	1
8	BET	0	0	4	0	0	0	0	0	0	0	0	0	0	0	0	0	2	0	0	0	0	0	0	2	0	0	0	0	8
9	C&W	0	0	11	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	4	0	0	0	0	22
10	CANTV	0	0	68	48	0	0	0	1	0	1	0	0	0	1	0	0	21	0	7	0	0	4	0	0	3	0	2	0	150
11	CODETEL	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	3	4	0	0	1	0	0	1	0	0	0	10
12	DACOM	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
13	DBP-T	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
14	EMBRATEL	0	0	59	0	0	3	2	0	2	0	0	2	3	1	0	20	0	12	0	1	3	0	0	4	0	3	0	2	118
15	ENTEL	0	0	10	0	0	0	0	0	0	0	0	0	0	0	0	2	0	2	0	0	1	0	0	2	0	0	0	0	10
16	FT	0	0	3	0	0	0	2	0	0	0	0	0	0	0	0	0	0	0	0	0	2	0	0	1	0	0	0	0	8
17	GT&T	0	0	4	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	5
18	GUATEL	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
19	HKTI	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
20	HONDUTEL	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2	0	0	0	0	2
21	HTC	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	2	1	0	0	0	0	0	4
22	IDC	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
23	INTEL	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	2
24	ITC	0	0	48	0	0	0	0	1	0	0	0	2	2	2	0	21	2	4	0	0	0	0	0	4	0	0	0	0	82
25	ITDC	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
26	ITJ	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
27	KDD	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
28	KT	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
29	LANDSRADIO	0	0	13	0	0	0	0	0	0	0	0	0	0	0	1	1	2	0	1	0	0	0	0	1	0	0	0	0	19
30	MARCONI	0	0	4	0	0	0	0	0	0	0	0	0	1	1	0	2	0	1	0	0	1	0	0	0	0	1	0	0	11
31	MCII	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	61	0	0	0	0	0	0	0	0	0	0	0	0	61
32	NPTT	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	1
33	OPTUS	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
34	PLDT	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
35	RETAR	0	0	3	0	0	0	0	0	0	0	0	0	0	0	0	1	0	1	0	0	0	0	0	0	0	0	0	0	5
36	SPRINT	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	30	0	0	0	0	0	0	0	0	0	30
37	ST	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	2
38	STBJ	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
39	TDM	0	0	3	0	0	0	0	0	0	0	0	0	0	0	0	2	0	0	0	0	0	0	0	1	0	0	0	0	6
40	TELCOR	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2	0	0	0	0	0	0	0	0	2
41	TELECOM	0	0	18	0	0	0	0	0	0	0	0	0	1	0	0	0	0	5	0	0	3	0	0	1	0	1	0	0	27
42	TELINTAR	0	0	28	0	0	0	0	0	1	0	0	1	1	0	0	0	0	4	0	0	2	0	0	2	0	2	0	0	40
43	TELMEX	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
44	TLD*	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2	65	0	3	0	0	0	0	80
45	TLFN	0	0	51	0	2	0	0	0	2	0	0	4	2	3	0	24	1	2	0	1	17	0	0	2	0	1	0	0	116
46	TRICOM	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
47	TRT/FTC	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2	0	0	2
48	TBTT	0	0	29	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2	0	0	0	0	0	0	0	0	0	0	33
49	VBHL	0	0	4	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	5
50	VTR	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	1
51	WCOM	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	3	3
52	TOTALS	0	1	782	48	4	4	5	1	5	4	0	7	14	7	1	284	3	87	6	4	33	65	5	41	6	12	1	7	1443

NOTES

COLUMN AC'S TOTALS ARE OBTAINED BY SUMMING THE JOINTLY HELD INTERESTS FOR EACH PARTY THUS, PARTY 1'S TOTAL IN COLUMN AC WOULD BE THE SUM OF A1 TO A51

ROW 52'S TOTALS ARE OBTAINED BY SUMMING EACH PARTY'S JOINTLY HELD INTERESTS THUS, PARTY A'S TOTAL IN ROW 52 WOULD BE THE SUM OF A1 TO A51

THE TOTAL SUM IN COLUMN AC, ROW 52 IS OBTAINED BY SUMMING COLUMN AC DOWN AS THE SUM OF AC1 TO AC51, OR BY SUMMING ROW 52 ACROSS AS THE SUM OF A52 TO A552

EACH PARTY'S HALF-MHJ TOTAL CAN BE OBTAINED BY ADDING THEIR TOTALS HORIZONTALLY AND VERTICALLY, OR ADDING THEIR TOTAL IN COLUMN AC TO THEIR TOTAL IN ROW 52

AMERICAS 1 CABLE SYSTEM
QUANTITIES OF MIUS JOINTLY HELD BY THE PARTIES TO THIS AGREEMENT
TOTAL OF THREE PAIRS BETWEEN THE BRANCHING UNIT AND MACQUERIPE
SEGMENT S2
CORRESPONDENT PARTIES (JOINTLY OR WHOLLY HELD INTERESTS)

*TLD's interests will be held in reserve.

	ALL PARTIES	(1) AACR-DR	(2) ANTEL	(3) ANTELCO	(4) CANTV	(5) DBP-T	(6) EMBRATEL	(7) ENTEL	(8) FT	(9) GT&T	(10) IDC	(11) ITC	(12) ITDC	(13) ITJ	(14) KDD	(15) KT	(16) LANDSRADIO	(17) MARCONI	(18) MCII	(19) NPTT	(20) SETAR	(21) SINGTEL	(22) SPRINT	(23) SPTT	(24) ST	(25) TELECOM	(26) TELINTAR	(27) TELMEX	(28) TLD*	(29) TLFN	(30) TLG3	(31) TRT/FTC	(32) TSTT	(33) WCOM	(34)	TOTAL
1	AACR-DR	2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2
2	ANTEL(URU)	0	0	2	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	3
3	ANTELCO	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
4	APTT	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5	AT&T	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
6	CANTV	1	0	60	62	5	0	2	1	10	1	1	0	3	21	1	0	7	0	4	3	10	3	2	2	198
7	CODETEL	0	0	0	3	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	3
8	DBP-T	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
9	EMBRATEL	0	0	12	2	2	2	1	0	2	0	1	0	0	6	0	0	3	0	0	0	2	1	0	0	34
10	ENTEL	0	0	2	1	1	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	1	1	0	0	7
11	FT	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
12	GT&T	0	0	4	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	5
13	IDC	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
14	ITC	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
15	ITDC	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
16	ITJ	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
17	KDD	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
18	KT	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
19	LANDSRADIO	1	0	8	0	1	1	0	0	0	0	0	0	0	3	2	0	1	0	0	0	0	1	0	0	18
20	MARCONI	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
21	MCII	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
22	NPTT	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
23	SETAR	0	0	3	0	0	0	0	0	0	0	0	0	0	1	1	0	1	0	0	0	0	0	0	0	6
24	SINGTEL	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
25	SPRINT	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
26	SPTT	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
27	ST	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
28	TELECOM	0	0	0	3	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	3
29	TELINTAR	0	0	5	1	0	0	0	0	0	0	0	0	0	2	0	0	1	0	0	0	3	0	0	0	12
30	TELMEX	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
31	TLD*	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
32	TLFN	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
33	TLG3	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
34	TRT/FTC	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
35	TSTT	0	0	22	0	0	0	0	0	1	0	0	0	0	6	0	0	2	0	0	1	0	5	0	0	37
36	WCOM	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
37	TOTAL	4	0		73	9	4	3	1	13	1	2	0	3	40	4	0	16	0	4	4	16	12	2	2	332

HALF ROW ENTRIES (COLUMN Y) TOTALS ARE OBTAINED BY CHECKING THE JOINTLY HELD INTERESTS FOR EACH PARTY (ROW), PARTY (Y) TOTAL IN COLUMN Y SHOULD BE THE SUM OF (A) TO (X)

DESIGN CAPACITY	3600
LOOPED TRAFFIC ADJUSTED DESIGN CAPACITY	1400
	1400
REVERSAL CAPACITY	600
CANADIAN ROUTING CAPACITY	740

ROW (Z) TOTALS ARE OBTAINED BY CHECKING EACH PARTY'S JOINTLY HELD INTERESTS (ROW), PARTY (Z) TOTAL IN ROW (Z) SHOULD BE THE SUM OF (A) TO (AA)

THE TOTAL SUM IN COLUMN Y, ROW (Z) IS OBTAINED BY CHECKING COLUMN Y DOWN AS ONE SUM OF (1) TO (36), OR BY CHECKING ROW (Z) ACROSS AS ONE SUM OF (AA) TO (AJ)

EACH PARTY'S HALF - ROW TOTAL CAN BE OBTAINED BY ADDING THEIR TOTALS HORIZONTALLY AND VERTICALLY. OR ADDING THEIR TOTAL IN COLUMN Y TO THEIR TOTAL IN ROW (Z)

AMERICAS 1 CABLE SYSTEM

QUANTITIES OF MIUS JOINTLY HELD BY THE PARTIES TO THIS AGREEMENT BETWEEN MAGENS BAY AND THE BRANCHING UNIT

SEGMENT S1

CORRESPONDENT PARTIES (JOINTLY OR WHOLLY HELD INTERESTS)

*TLD's interests will be held in reserve.

	ALL PARTIES	(1) AACR-DR	(2) APTT	(3) ANTEL	(4) CANTV	(5) DBP-T	(6) EMBRATEL	(7) ENTEL	(8) FT	(9) GT&T	(10) IDC	(11) ITDC	(12) ITJ	(13) KDD	(14) KT	(15) LANDSRADIO	(16) MARCONI	(17) MCII	(18) NPTT	(19) SETAR	(20) SINGTEL	(21) SPRINT	(22) SPTT	(23) ST	(24) TELCOR	(25) TELECOM	(26) TELINTAR	(27) TELMEX	(28) TLD *	(29) TLFN	(30) TLGB	(31) TRT/FTC	(32) TSTT	(33) VTR	(34) WCOM	(35) TOTAL
1	AACR-DR	2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2
2	ANTEL(URU)	0	0	5	0	0	0	0	0	1	0	0	0	0	0	2	0	0	1	0	0	0	0	0	0	2	1	0	0	0	0	0	0	0	12
3	ANTELCO	0	0	3	0	1	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	6
4	APTT	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5	AT&T	0	0	2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2
6	BELGACOM	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
7	CANTV	1	0	60	62	5	0	2	1	10	1	0	1	0	3	21	1	0	7	0	0	0	4	3	10	3	2	0	2	199					
8	CODETEL	0	0	0	3	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	4					
9	DBP-T	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0					
10	EMBRATEL	0	1	52	0	8	9	4	3	10	1	3	5	1	6	30	2	1	12	2	1	0	3	1	8	4	3	0	2	172					
11	ENTEL	0	0	12	0	2	0	0	0	2	0	0	0	0	0	2	0	0	2	0	0	0	1	0	6	2	0	0	0	29					
12	FT	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0					
13	GT&T	0	0	4	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	5					
14	IDC	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0					
15	ITDC	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0					
16	ITJ	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1					
17	KDD	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0					
18	KT	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0					
19	LANDSRADIO	1	0	8	0	1	0	0	0	0	0	0	0	0	0	3	2	0	1	0	0	0	0	0	0	1	0	0	0	17					
20	MARCONI	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	1					
21	MCII	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0					
22	NPTT	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0					
23	SETAR	0	0	3	0	0	0	0	0	0	0	0	0	0	0	1	1	0	1	0	0	0	0	0	0	0	0	0	0	6					
24	SINGTEL	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0					
25	SPRINT	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0					
26	SPTT	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0					
27	ST	0	0	0	0	0	2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2					
28	TELCOR	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0					
29	TELECOM	0	0	0	3	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	3					
30	TELINTAR	0	0	26	0	6	0	2	1	10	0	1	1	0	0	8	0	0	4	0	0	0	2	0	14	2	2	0	0	79					
31	TELMEX	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0					
32	TLD *	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0					
33	TLFN	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0					
34	TLGB	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0					
35	TRT/FTC	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0					
36	TSTT	0	0	22	0	0	0	0	0	1	0	0	0	0	0	6	0	0	2	0	0	0	0	1	0	5	0	0	0	37					
37	VTR	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	1					
38	WCOM	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0					
39	TOTAL	4	1	197	69	23	13	8	5	35	2	4	7	1	9	73	6	1	30	2	1	1	10	5	41	19	7	1	4	579					

NOTES: COLUMN AC'S TOTALS ARE OBTAINED BY SUMMING THE JOINTLY HELD INTERESTS FOR EACH PARTY SHOWN. PARTY TO TOTAL IN COLUMN AC SHOULD BE THE SUM OF A1 TO AB1.

ROW BD'S TOTALS ARE OBTAINED BY SUMMING EACH PARTY'S JOINTLY HELD INTERESTS SHOWN. PARTY A'S TOTAL IN ROW 40 SHOULD BE THE SUM OF A1 TO AB.

THE TOTAL SUM IN COLUMN AC, ROW 39 IS OBTAINED BY SUMMING COLUMN AC DOWN AS THE SUM OF AC1 TO AC38 OR AT

THE PARTIES' MIU TOTALS CAN BE OBTAINED BY ADDING THEIR TYPE A HORIZONTALLY AND VERTICALLY OR ADDING THEIR

AMERICAS 1 CABLE SYSTEM
QUANTITIES OF MIUS JOINTLY HELD BY THE PARTIES TO THIS AGREEMENT
THE TWO PAIRS BETWEEN THE BRANCHING UNIT AND MACQUERIPE
SEGMENT S2
CORRESPONDENT PARTIES (JOINTLY OR WHOLLY HELD INTERESTS)

*TLD's interests will be held in reserve.

	ALL PARTIES	(1) AACR-DR	(2) AT&T	(3) CANTV	(4) DBP-T	(5) FT	(6) IDC	(7) ITC	(8) ITDC	(9) ITJ	(10) KDD	(11) LANDSRADIO	(12) MARCONI	(13) MCII	(14) NPTT	(15) SPRINT	(16) TELMEX	(17) TLD	(18) TLFN	(19) TLGB	(20) TRT/FTC	(21) WCOM	(T) TOTAL
1	AACR-DR	2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2
2	AT&T	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
3	CANTV	1	60	62	5	2	1	10	1	1	3	21	1	7	4	3	10	3	2	2	199
4	CODETEL	0	0	3	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	3
5	DBP-T	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
6	FT	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
7	GT&T	0	4	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	5
8	IDC	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
9	ITC	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
10	ITDC	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
11	ITJ	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
12	KDD	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
13	LANDSRADIO	1	8	0	1	0	0	0	0	0	0	3	2	1	0	0	0	1	0	0	17
14	MARCONI	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
15	MCII	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
16	NPTT	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
17	SETAR	0	3	0	0	0	0	0	0	0	0	1	1	1	0	0	0	0	0	0	6
18	SPRINT	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
19	TELECOM	0	0	3	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	3
20	TELMEX	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
21	TLD*	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
22	TLFN	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
23	TLGB	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
24	TRT/FTC	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
25	TSTT	0	22	0	0	0	0	1	0	0	0	6	0	2	0	1	0	5	0	0	37
26	WCOM	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
27	TOTAL	4	97	69	6	2	1	11	1	1	3	31	4	11	4	4	10	10	2	2	273

	HALF MIUS
DESIGN CAPACITY:	1000
LOOPED TRAFFIC:	140
ADJUSTED DESIGN CAPACITY:	860
BIFURCAL CAPACITY	540
COMMON RESERVE CAPACITY	364

NOTES: A LIMIT OF 860 HALF-MIUS FOR LOOPED TRAFFIC HAS BEEN SET FOR THE TWO PAIRS BETWEEN THE BRANCHING UNIT AND MACQUERIPE

COLUMN T'S TOTALS ARE OBTAINED BY SUMMING THE JOINTLY HELD INTERESTS FOR EACH PARTY THUS, PARTY 1'S TOTAL IN COLUMN T WOULD BE THE SUM OF A1 TO G1.

ROW 27'S TOTALS ARE OBTAINED BY SUMMING EACH PARTY'S JOINTLY HELD INTERESTS THUS, PARTY A'S TOTAL IN ROW 27 WOULD BE THE SUM OF A1 TO A26

THE TOTAL SUM IN COLUMN T ROW 27 IS OBTAINED BY SUMMING COLUMN T DOWN AS THE SUM OF T1 TO T26, OR BY SUMMING ROW 27 ACROSS AS THE SUM OF A27 TO G27

EACH PARTY'S HALF-MIU TOTAL CAN BE OBTAINED BY ADDING THEIR TOTALS HORIZONTALLY AND VERTICALLY, OR ADDING THEIR TOTAL IN COLUMN T TO THEIR TOTAL IN ROW 27

AMERICAS 1 CABLE SYSTEM
QUANTITIES OF MIUS JOINTLY HELD BY THE PARTIES TO THIS AGREEMENT
THE ONE PAIR BETWEEN THE BRANCHING UNIT AND MACQUERIPE
SEGMENT S2

	ALL PARTIES	(A) AT&T	(B) CANTV	(C) DBP-T	(D) EMBRATEL	(E) FT	(F) IDC	(G) ITC	(H) KDD	(I) MCII	(J) SPRINT	(K) TELMEX	(L) TLFN	(M) TLGB	(N) TRT/FTC	(O) TOTAL
1	ANTEL(URU)	2	0	0	0	0	0	0	0	1	0	0	0	0	0	3
2	ANTELCO	1	0	0	0	0	0	0	0	0	0	0	0	0	0	1
3	AT&T	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
4	CANTV	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5	CODETEL	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
6	DBP-T	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
7	EMBRATEL	12	2	2	2	1	0	2	1	6	3	0	2	1	0	34
8	ENTEL	2	1	1	0	0	0	0	0	0	1	0	1	1	0	7
9	FT	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
10	IDC	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
11	ITC	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
12	KDD	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
13	LANDSRADIO	0	0	0	1	0	0	0	0	0	0	0	0	0	0	1
14	MARCONI	0	0	0	1	0	0	0	0	0	0	0	0	0	0	1
15	MCII	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
16	SPRINT	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
17	TELINTAR	5	1	0	0	0	0	0	0	2	1	0	3	0	0	12
18	TELMEX	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
19	TLFN	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
20	TLGB	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
21	TRT/FTC	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
22	TOTAL	22	4	3	4	1	0	2	1	9	5	0	6	2	0	59

	HALF MIUS
DESIGN CAPACITY:	684
NOTIONAL CAPACITY*:	116
COMMON RESERVE CAPACITY:	368

* INCLUDES 168 FOR LOOPED TRAFFIC

NOTES: COLUMN O'S TOTALS ARE OBTAINED BY SUMMING THE JOINTLY HELD INTERESTS FOR EACH PARTY. THUS, PARTY 1'S TOTAL IN COLUMN O WOULD BE THE SUM OF A1 TO N1.

ROW 22'S TOTALS ARE OBTAINED BY SUMMING EACH PARTY'S JOINTLY HELD INTERESTS. THUS, PARTY A'S TOTAL IN ROW 22 WOULD BE THE SUM OF A1 TO A21.

THE TOTAL SUM IN COLUMN O, ROW 22 IS OBTAINED BY SUMMING COLUMN O DOWN AS THE SUM OF O1 TO O21, OR BY SUMMING ROW 22 ACROSS AS THE SUM OF A1 TO A21.

EACH PARTY'S HALF-MIU TOTAL CAN BE OBTAINED BY ADDING THEIR TOTALS HORIZONTALLY AND VERTICALLY, OR ADDING THEIR TOTAL IN COLUMN O TO THEIR TOTAL IN ROW 22

AMERICAS 1 CABLE SYSTEM

QUANTITIES OF MIUS JOINTLY HELD BY THE PARTIES TO THIS AGREEMENT

*TLD's interests will be held in reserve.

BETWEEN MACQUERIPE AND CAMURI

SEGMENT S3

CORRESPONDENT PARTIES (JOINTLY OR WHOLLY HELD INTERESTS)

	ALL PARTIES	(1) AACR-DR	(2) AT&T	(3) BET	(4) CANTV	(5) CODETEL	(6) DBP-T	(7) EMBRATEL	(8) ENTEL	(9) FT	(10) IDC	(11) ITC	(12) ITDC	(13) ITJ	(14) KDD	(15) LANDSRADIO	(16) MARCONI	(17) MCII	(18) NPTT	(19) SETAR	(20) SPRINT	(21) TELECOM	(22) TELINTAR	(23) TELMEX	(24) TLD	(25) TLFN	(26) TLGB	(27) TRT/FTC	(28) TSTT	(29) WCOM	(30) TOTAL
1	AACR-DR	2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2
2	AT&T	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
3	BET	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
4	CANTV	1	60	1	62	3	5	2	1	2	1	10	1	1	3	21	1	7	1	4	3	10	3	2	4	2	211
5	CODETEL	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
6	DBP-T	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
7	EMBRATEL	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
8	ENTEL	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
9	FT	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
10	IDC	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
11	ITC	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
12	ITDC	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
13	ITJ	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
14	KDD	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
15	LANDSRADIO	1	8	0	0	0	1	1	0	0	0	0	0	0	0	3	2	1	0	0	0	0	1	0	1	0	19
16	MARCONI	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
17	MCII	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
18	NPTT	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
19	SETAR	0	3	0	0	0	0	0	0	0	0	0	0	0	0	1	1	1	0	0	0	0	0	0	0	0	6
20	SPRINT	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
21	TELECOM	0	0	0	3	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	3
22	TELINTAR	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
23	TELMEX	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
24	TLD*	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
25	TLFN	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
26	TLGB	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
27	TRT/FTC	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
28	TSTT	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
29	WCOM	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
30	TOTALS	4	71	1	66	3	6	3	1	2	1	10	1	1	3	25	4	9	1	4	3	10	4	2	5	2	242

NOTES: COLUMN 2'S TOTALS ARE OBTAINED BY SUMMING THE JOINTLY HELD INTERESTS FOR EACH PARTY THUS, PARTY 1'S TOTAL IN COLUMN 2 WOULD BE THE SUM OF A1 TO T1

ROW 30'S TOTALS ARE OBTAINED BY SUMMING EACH PARTY'S JOINTLY HELD INTERESTS THUS, PARTY A'S TOTAL IN ROW 30 WOULD BE THE SUM OF A1 TO A29

THE TOTAL SUM IN COLUMN 2, ROW 30 IS OBTAINED BY SUMMING COLUMN 2 DOWN AS THE SUM OF 2+ TO 230, OR BY SUMMING ROW 30 ACROSS AS THE SUM OF A30 TO T30

EACH PARTY'S HALF - SEAT TOTAL CAN BE OBTAINED BY ADDING THEIR TOTALS HORIZONTALLY AND VERTICALLY, OR ADDING THEIR TOTAL IN COLUMN 2 TO THEIR TOTAL IN ROW 30

AMERICAS 1 CABLE SYSTEM

QUANTITIES OF MIUS JOINTLY HELD BY THE PARTIES TO THIS AGREEMENT BETWEEN THE BRANCHING UNIT AND FORTALEZA SEGMENT S4

CORRESPONDENT PARTIES (JOINTLY OR WHOLLY HELD INTERESTS)

*TLD's interest will be held in reserve.

	ALL PARTIES	(1) APTT	(2) AT&T	(3) CANTV	(4) DBP-T	(5) EMBRATEL	(6) ITI	(7) ISC	(8) ITC	(9) JRDC	(10) LU	(11) KDD	(12) KT	(13) SPTT	(14) SINGTEL	(15) SPRINT	(16) TELCOR	(17) TELINTAR	(18) TELMEX	(19) TLD*	(20) TLFN	(21) TLGB	(22) TRT/FTC	(23) VTR	(24) WCOM	(AA) TOTAL
1	ANTEL(URU)	0	5	0	0	0	0	0	1	0	0	0	2	0	0	1	0	0	0	0	2	1	0	0	0	12
2	ANTELCO	0	3	0	1	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	6
3	APTT	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
4	AT&T	0	2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2
5	BELGACOM	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
6	CANTV	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
7	CODETEL	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
8	DBP-T	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
9	EMBRATEL	1	52	2	8	9	4	3	10	1	3	5	1	30	2	1	12	2	1	0	3	1	8	4	3	0	2	168
10	ENTEL	0	12	1	2	0	0	0	2	0	0	0	0	2	0	0	2	0	0	0	1	0	6	2	0	0	0	30
11	FT	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
12	IDC	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
13	ITDC	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
14	ITJ	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
15	KDD	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
16	KT	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
17	LANDSRADIO	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
18	MARCONI	0	0	0	0	6	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	7
19	MCII	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
20	NPTT	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
21	SINGTEL	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
22	SPRINT	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
23	SPTT	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
24	ST	0	0	0	0	2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2
25	TELCOR	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
26	TELINTAR	0	26	1	6	0	2	1	10	0	1	1	0	8	0	0	4	0	0	0	2	0	14	2	2	0	0	80
27	TELMEX	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
28	TLD*	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
29	TLFN	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
30	TLGB	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
31	TRT/FTC	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
32	VTR	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	1
33	WCOM	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
34	TOTAL	1	100	4	17	20	6	4	24	1	4	6	1	42	2	1	19	2	1	1	6	1	31	9	5	1	2	311

NOTES

COLUMN AA'S TOTALS ARE OBTAINED BY SUMMING THE JOINTLY HELD INTERESTS FOR EACH PARTY. THUS, PARTY 1'S TOTAL IN COLUMN AA WOULD BE THE SUM OF A1 TO Z1.

ROW 34'S TOTALS ARE OBTAINED BY SUMMING EACH PARTY'S JOINTLY HELD INTERESTS. THUS, PARTY A'S TOTAL IN ROW 34 WOULD BE THE SUM OF A1 TO A33.

THE TOTAL SHOWN IN COLUMN AA, ROW 34 IS OBTAINED BY SUMMING COLUMN AA DOWN AS THE SUM OF AA1 TO AA33, OR BY SUMMING ROW 34 ACROSS AS THE SUM OF A34 TO Z34.

EACH PARTY'S HALF SIDE TOTAL CAN BE OBTAINED BY ADDING THEIR TOTALS HORIZONTALLY AND VERTICALLY, OR ADDING THEIR TOTAL IN COLUMN AA TO THEIR TOTAL IN ROW 34.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-571

In the Matter of

Telecommunications Relay
Services, and the Americans with
Disabilities Act of 1990

THIRD REPORT AND ORDER

Adopted: July 15, 1993; **Released: July 20, 1993**

By the Commission: Commissioner Barrett issuing a statement.

I. INTRODUCTION

1. By this action, the Commission amends its rules to provide that interstate telecommunications relay services (TRS) costs shall be recovered utilizing a shared-funding mechanism pursuant to the funding plan set forth in Appendix B, and outlined below.

II. BACKGROUND

2. In order to fulfill the mandate of the Americans with Disabilities Act of 1990 (ADA) that the Commission ensure that interstate and intrastate telecommunications relay services[1] are available, to the extent possible and in the most efficient manner to individuals in the United States with hearing and speech disabilities by July 26, 1993, this Commission, on November 8, 1990, initiated a rulemaking proceeding.[2] After consideration of the extensive public comments on our TRS proposals and the specific requirements of Title IV of the ADA[3] we adopted a Report and Order (*TRS Order*).[4] In the *TRS Order*, we fashioned a comprehensive set of rules which set forth terminology and definitions of TRS, prescribed operational, technical, and functional minimum standards required of all TRS providers, and delineated the state certification process. Additionally, the *TRS Order* requested further comment on interstate TRS cost recovery.

3. On February 19, 1993, in an Order on Reconsideration, Second Report and Order, and Further Notice of Proposed Rulemaking (*TRS II*),[5] the Commission resolved five petitions for reconsideration, adopted a shared-funding mechanism for interstate TRS cost recovery, and proposed a specific plan establishing a TRS interstate cost recovery fund (TRS Fund).[6] In response to its request for comments on the TRS Fund, the Commission received twenty-three comments and seventeen reply comments.[7] In this order the Commission imposes annual and other reporting requirements on TRS providers and TRS Fund contributors to implement shared-funding.

III. DISCUSSION

A. The TRS Fund Administrator

4. *Comments.* In *TRS II*, the Commission proposed that, effective July 26, 1993, the interstate cost recovery TRS Fund be administered by the National Exchange Carrier Association, Inc. (NECA).[8] Further, the Commission proposed that NECA's performance and the TRS Fund would be reviewed by the Commission after two years to determine whether any changes are necessary.[9] In their comments, Ameritech, AT&T, BellSouth, NARUC, NCLD, NYNEX, Robinson, Sprint, SWB, USTA, and GTE support the Commission's proposal to appoint NECA as administrator of the TRS Fund because they assert that NECA has demonstrated experience with administering pooling mechanisms, and this experience will keep administrative costs low. Most of the commenters supporting this proposal further propose that NECA keep the TRS Fund separate from its other functions. Specifically, USTA proposes that the TRS fund be established as an escrow account and not commingled with other funds.[10] Further, NARUC, NCLD, and Robinson, in their comments, propose that an advisory committee, comprised of representatives from the interstate service industry, TRS providers, individuals with hearing and speech disabilities, state programs, the fund administrator, and the Commission, be established to monitor interstate TRS compliance and address telecommunications issues related to TRS.

5. In their comments, MCI, ACTA, GCI, and Allnet strongly oppose the selection of NECA as administrator of the TRS Fund because they contend that NECA is associated with one specific industry group (local exchange carriers), and that NECA has demonstrated an inability to

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[1] Telecommunications relay service (TRS) allows people with hearing and/or speech disabilities to use the telephone. TRS facilities are equipped with specialized equipment and staffed by communications assistants (CAs) who relay conversation between people who use text telephones and people who use traditional telephones.

[2] *See* Notice of Proposed Rulemaking, CC Docket No. 90-571, 55 Fed. Reg. 50037 (Dec. 4, 1990); 5 FCC Rcd 7187 (1990).

[3] *See* S.933, Pub. L. 101-336, 104 Stat. 327, 366-69 (July 26, 1990).

[4] Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, CC Docket No. 90-571, Report and Order and Request for Comments, 6 FCC Rcd 4657 (1991) (*TRS Order*).

[5] Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, Order on Reconsideration, Second Report and Order, and Further Notice of Proposed Rulemaking, 8 FCC Rcd 1802 (February 25, 1993), (hereinafter *TRS II*).

[6] *See TRS II* at Appendix D.

[7] Appendix A lists the parties filing comments and reply comments, as well as abbreviations used throughout this Order to refer to those parties.

[8] *TRS II* at Appendix D, Section 64.604 (c)(4)(iii).

[9] *TRS II* at Appendix D, Section 64.604 (c)(4)(iii)(i).

[10] Comments of USTA at 9.

control administrative costs in its performance as administrator of other pools. Specifically, MCI proposes that the Commission adopt a self-funding mechanism for the first year of TRS implementation, then utilize a pooling mechanism, with the administrator selected through a competitive bidding process. MCI asserts that this alternative would give TRS providers an extension of time in which to gain experience providing this new telecommunications service. As a second alternative, MCI proposes that NECA act as interim administrator for two years, requiring NECA to submit to the Commission annual reports reflecting actual and projected administrative costs. After this interim period, MCI proposes that the Commission transfer the task to a competitively selected bidder. Further, MCI proposes that the administrator of the fund be a not-for-profit entity, paid on a flat, monthly fee basis because this arrangement would eliminate any incentive to overcharge contributors and the administrator would return or carry-over any excess funds to the TRS Fund.

6. In their reply comments, GTE reiterates that NECA should be selected as administrator because NECA has improved its record as a fund administrator, and lowered its administrative costs in administering other pools.[11] Many commenters assert that MCI's self-funding approach would needlessly delay implementation. In its reply comments, NECA asserts that dramatic changes have occurred in its organization since 1988, and that it has demonstrated the high level of competence necessary to act as TRS Fund administrator.

7. *Decision.* Because of its experience in administering other pooling arrangements, including the USF and Lifeline Assistance programs, and because a broad cross-section of interested parties commenting in the record support the shared-funding mechanism and the selection of NECA, NECA shall act as interim administrator of the TRS Fund. MCI's self-funding alternative was thoroughly examined in *TRS II* and rejected. However, we are persuaded that MCI's proposal that NECA serve an interim term as administrator and report its administrative costs to the Commission on an annual basis is an appropriate approach. Therefore, we shall review NECA's performance after two years. Further, we will entertain proposals by other parties interested in functioning as future administrator of the TRS Fund and shall solicit comment and alternative proposals. Further, we direct NECA to report annually to the Commission an itemization of monthly administrative costs which shall consist of all expenses, receipts, and payments associated with the administration of TRS Fund. The administrator shall file a cost allocation manual (CAM)[12] with the Commission, and shall provide the Commission full access to all data collected pursuant to the administration of the TRS Fund. We further require that the administrator shall be subject to a yearly audit by an independent certified accounting firm and by the Commission, if the Commission so requests. The administrator is further required to keep the TRS Fund separate from all other funds under the control of the administrator.

8. We find merit in the proposal of NCLD, Robinson, and NARUC that there be an advisory committee to monitor TRS cost recovery issues. We find that as part of its administrative function, NECA should establish such a committee and consider guidance from its members on TRS issues. Therefore, we further direct NECA to establish a non-paid, voluntary advisory committee of persons from the hearing and speech disability community, TRS users (voice and text telephone), interstate service providers, state representatives, and TRS providers. Each group shall select its own representative to the committee. The committee will meet at reasonable intervals (at least semi-annually) in order to monitor TRS cost recovery matters. NECA's annual report to the Commission shall include a discussion of advisory committee deliberations. We find that with these additional safeguards in place, NECA is uniquely placed to effectuate timely and efficient implementation of the TRS Fund.

B. Contributions to the TRS Fund

9. *Comments.* The Commission, in *TRS II*, proposed that a charge would be assessed on all common carriers that offer interstate telecommunications services on the basis of their relative share of nationwide interstate revenues for common carrier services.[13] In their comments, Ameritech, Bell Atlantic, BellSouth, USTA, MCI, SWB, NECA, and GTE generally support the Commission's proposal that contributions to the fund be based on relative share of interstate revenues. However, these commenters request clarification as to what constitutes interstate telecommunications services. Specifically, Sprint, NYNEX, MCI, Ameritech, Bell Atlantic, BellSouth, and USTA propose that the Commission clarify that revenues from access charges and end-user line charges be excluded from the fund because inclusion of access revenues will cause double-billing and subscriber line charges do not constitute interstate service revenues, rather they are flat rate charges that do not reflect usage of interstate service. Further, these commenters propose that the Commission require TRS Fund contributions from providers of every interstate service including resellers, cellular carriers, interstate alternative access and special access, packet-switched, WATS, 800, private dedicated, international,[14] satellite, and interstate intraLATA service providers. NCLD, Robinson, and USTA propose that the widest possible scope of interstate service providers should contribute to the fund including all current and future interstate providers of end-to-end or intermediate transport, whether common carrier or non-common carrier, pursuant to the language of the ADA on cost recovery.

10. In its comments, NECA proposes that the Commission clarify that contributions should be billed based on interstate revenues that are booked in accounts 5100-5169 of the Uniform System of Accounts, 47 CFR § 32.5100-5169, which would not include access revenues which NECA concurs would cause double billing of services. NECA asserts that contributions should be made by resellers and that the Commission's rules should be modified to require facilities-based carriers to exclude revenues

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[11] Reply comments of GTE at 13.

[12] This manual will describe the accounts and procedures the administrator will use to segregate and allocate the costs of administering the TRS Fund from its other operations.

[13] *TRS II* at Appendix D, Section 64.604 (c)(4)(iii)(a).

[14] Sprint argues that international services should be included because TRS providers will be compensated by the administrator for international TRS minutes of use.

associated with resold services. NECA further proposes a "banding" mechanism for use with interstate service providers that have revenues below a certain amount. NECA and other commenters propose the banding mechanism in order to avoid administrative burdens for small carriers and high administrative costs for the administrator of the fund. NECA proposes that the administrator would bill a flat rate on a quarterly or annual basis if the contributor's share is *de minimis*.

11. In their comments, AT&T, ACTA, and GCI propose that contributions to the fund be based on a pro-rata share of interstate traffic minutes because they contend that this is a more equitable method of calculation than contributions based on gross interstate revenues. CTIA, in its comments, asserts that cellular services are essentially intrastate, that less than 1% of the cellular industry revenue is from interstate services, and that cellular carriers lack information required to determine their pro rata share of interstate services. Therefore, CTIA proposes that the banding alternative be utilized for cellular carriers. BellSouth, McCaw, USTA, and GTE concur with NECA and CTIA and propose that a banding mechanism be utilized where the pro rata share of gross interstate revenues would generate less than a $100 yearly contribution to the fund.

12. *Decision.* In order to provide universal telephone service to TRS users as mandated by the ADA, Congress ordered the Commission to prescribe regulations providing generally that costs caused by interstate telecommunications relay services should be recovered from all subscribers to every interstate service. Commenters proposed that we clarify and define with specificity the persons who would be required to contribute to the TRS Fund. Congress may have contemplated that the Commission might recover the cost for the interstate telecommunications relay service through the imposition of a fixed monthly charge on residential customers,[15] similar to the subscriber line charges assessed on subscribers to local telephone service under Part 69 of the Commission's rules,[16] even though doing so would not seem to capture "all subscribers to every interstate service." Representatives of the hearing impaired find this cost recovery mechanism objectionable,[17] and we do not choose to use such a mechanism. However, we believe that we can accomplish the goals of the Act by having NECA recover these costs from all common carriers that provide interstate service.[18] USTA argues that in the July 12, 1990 House Conference Report on Pub. Law 101-336, the Conference Committee stated that the costs of interstate relay service should be "recovered from all subscribers for every interstate service, even those businesses that have private telecommunications systems".[19] We believe that recovering interstate relay costs from all common carriers who provide interstate service on the basis of their interstate revenues will accomplish this goal. It appears that Congress intended the term "private telecommunications systems" to mean private networks provided by common carriers, such as AT&T's Tariff 12 offerings. These networks, therefore, will be included in the cost recovery process.[20] Nothing in the legislative history indicates that Congress intended the term "private telecommunications systems" to mean facility-based private networks owned and operated by private carriers or private entities.[21] Accordingly, we direct that for the purposes of funding interstate TRS, interstate service includes, but is not limited to, the interstate portion of: cellular telephone and paging, mobile radio, operator services, personal communications service (PCS), access (including subscriber line charges), alternative access and special access, packet-switched, WATS, 800, 900, message telephone (MTS), private line, telex, telegraph, video, satellite, international, intraLATA, and resale services, provided by common carriers.

13. Some commenters assert that it is inappropriate to require contributions from providers of resale services, access services, or cellular services. Some commenters suggest that double payment would occur if both resold and underlying services are subject to contribution. These commenters assert that double payment results because the charge for the resold service would presumably cover the contribution for the resold service as well for the underlying services. However, current accounting requirements do not separate carrier revenues for services provided to resellers from services provided to final customers. Similarly, current accounting requirements do not separate the cost of underlying service obtained for resale from other carrier costs. For most carriers, the cost of identifying double counting would probably exceed the contribution associated with any double counting. Even if the rules exempted resold service from contribution, it is unlikely that all customers would, in effect, end up making equal proportionate contributions, because most interstate rates are not calculated on a cost plus basis, but rather, are shaped by market forces. Accordingly, the potential unfairness of double counting is not sufficient to justify excluding access or resale services from contribution. This treatment also is consistent with the purpose of the ADA which is to recover the costs of TRS from all providers of interstate services.

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[15] *See* House Conference Report No. 101-558, June 26, 1990, 101st Cong., 2nd Sess., at para. 67, where the Conference Committee removed the Senate bill's prohibition on such monthly subscriber line charges as a mechanism for funding a telecommunications relay system.

[16] *See* 47 C.F.R. § 69.104. The subscriber line charge or end user common line charge is imposed upon all end users that subscribe to local exchange telephone service, Centrex, or semi-public coin telephone service to the extent they do not pay carrier common line charges. That charge is billed pursuant to interstate tariffs filed by all carriers that provide local exchange telephone service. *See* 47 C.F.R. § 69.2(hh).

[17] *See e.g.*, comments of NCLD summarized in *TRS Order*, note 4, *supra*, at para. 32.

[18] The common carriers, of course, would in turn recover these costs from their subscribers.

[19] *See* USTA Reply Comments at 3-4, citing House Conference Report No. 101-596, July 12, 1990, 101st Congress, 2d Session. "Private telecommunications system" is not further defined or described.

[20] We agree with USTA that "the Commission should not view the funding base as being static; rather, it is a continuing evolutionary process, with new players being added from time to time." *See* USTA Reply Comments at 4.

[21] We note that when these interstate private facilities interconnect with the public switched telephone network, they will generally pay either interstate access charges or a special surcharge pursuant to Section 69.115 of the Commission's rules. They will, in this manner, add to the interstate revenue base.

14. In its comments, NECA argues that most subscriber line charges are capped, and that any contribution attributed to subscriber line charges would, in fact, be recovered from users of other interstate access service. We do not find merit in NECA's incremental cost argument. Our general approach is to identify all interstate common carrier services, and to assess a contribution factor against the revenue from those services. All carriers subject to Part 32 of the Commission's rules will record TRS contributions in their books of account in the manner prescribed by the Uniform System of Accounts. Federal subscriber line charges are billed to the public to recover at least part of the interstate costs of providing the local loop. Therefore, we find this is an interstate service for purposes of recovering TRS costs.

15. With regard to cellular service providers, we find no basis upon which to exclude revenues from interstate cellular services. We find that all interstate revenue associated with cellular service shall be subject to TRS contribution.

16. Based upon the record before us, we find that contributions shall be based on each interstate service provider's relative share of gross interstate revenues subject to contribution as modified above. We reject the proposals of AT&T, ACTA, and GCI. While a calculation based upon minutes of use could provide an accurate measure of a service provider's share of switched services, this method would not account adequately for services that utilize dedicated facilities, and would not encompass various types of new services offered by traditional and emerging carriers. Accordingly, contributors shall calculate their contribution to the TRS fund as the product of their subject revenues for the prior calendar year and a contribution factor determined by the Commission. For efficiency of administration, we modify our proposed rules to incorporate a minimum yearly contribution of $100. Thus, each subject carrier must contribute at least $100 per year. Service providers whose annual contributions total less than $1,200 must pay the entire contribution at the beginning of the contribution period. Service providers whose contributions total $1,200 or more may divide their contributions into equal monthly payments.

17. Initial contributions to the TRS Fund are due September 26, 1993. The Commission has developed a "TRS Fund Worksheet," which shall be published in the Federal Register to enable contributors to determine their contributions. Upon approval by the Office of Management and Budget, a Public Notice will be issued, indicating how copies may be obtained. In order to facilitate timely filing, the proposed TRS Fund Worksheet is included herein as Appendix D. The worksheet will direct each carrier to provide identification information and revenue data, to calculate a TRS contribution, and to file the worksheet and contribution with the FCC TRS Fund Administrator. The worksheet shall be certified to by an officer of the contributor, and subject to verification by the Commission or the administrator at the discretion of the Commission. Contributors' statements in the worksheet shall be subject to the enforcement provisions of the Act.

18. Carriers are to provide gross revenues by 10 categories of revenues. These categories represent major types of telecommunications services. Carriers will report gross revenues, rather than interstate revenues, because gross revenues can be traced to a carrier's books of account. Carriers are required to estimate the percentage of each revenue category that arises from interstate service.

C. Computation of Fund Contributions

19. *Comments.* In *TRS II*, we asked for comment regarding the feasibility of requiring all carriers subject to the ADA to report interstate revenues to the fund administrator and on whether the administrator should play a role in enforcing compliance with such a rule.[22] Several commenters expressed concern that much of the information to be collected by a fund administrator in order to determine the calculations for fund contributions is confidential and proprietary in nature. Specifically, ACTA, AT&T and USTA, in their comments, request that the Commission prescribe uniform protective agreements, to be used in the same manner as those used in tariff investigations. MCI proposes that the data collected for calculation of fund contributions by NECA be held confidential for one year. In its comments, NECA proposes that filings associated with contributions not be treated as tariff filings because the administrator will not be offering TRS service. Further, NECA proposes that the proposed rules be modified to require that the administrator shall keep all data obtained from TRS providers and contributors confidential, shall not use such data except for purposes of administering the TRS Fund, and shall not disclose such data in company-specific form unless directed to do so by the Commission.

20. *Decision.* As noted above, and in order to lessen administrative burdens on contributors to the fund and the fund administrator, we modify the proposed rules to require that all providers of interstate services calculate their TRS contributions in accordance with the TRS Fund Worksheet. The contributor shall file the TRS Fund Worksheet, along with any amounts due, with the fund administrator. The Commission shall have full access to all data received by the administrator. Requests for Commission nondisclosure can be made under 47 C.F.R. § 0.459. The Commission will base a carrier's contribution on the ratio of the expected TRS payments to interstate service revenues subject to contribution, which shall be calculated on the basis of information provided by the administrator.

21. The contribution factor to be used in the TRS Fund Worksheet for the initial contribution period, July 26, 1993 through April 26, 1994, is .00047. This factor is based on the ratio of expected costs for providing interstate TRS for one year and the expected interstate revenue base. The National Exchange Carrier Association (NECA), the interim TRS Fund administrator, estimates a first year funding requirement of $30 million based on their estimate of 14 to 17 million minutes of interstate TRS service, a payment of about $1.705 per interstate TRS minute, administrative expenses of about $312,000, development costs of about $567,000, and uncollectibles of $800,000. Appendix C estimates a 1992 interstate revenue base of $63,464 million. Accordingly, a contribution of $0.00047 for each dollar of interstate revenue should provide adequate TRS funding. To allow for the uncertainties in estimating both costs and reportable revenues, the initial contribution period provides TRS funding for 9 months, while the contribution rate is based on expected TRS funding requirements for 12 months.

[22] *TRS II*, at 11.

22. This calculation is necessarily inexact. In the event that contributions exceed TRS payments and administrative costs, the contribution factor for the following year will be adjusted by an appropriate amount, taking into consideration projected cost and usage changes. In the event that contributions are inadequate, the fund administrator may request authority from the Commission to borrow funds commercially, with such debt secured by future year TRS contributions. In such event, the contribution factor for the following year's contributions shall be increased by an appropriate amount. Further, we find merit in NECA's proposal regarding confidentiality and require that the fund administrator keep all data obtained from TRS providers and contributors confidential, not use such data except for purposes of administering the TRS Fund, and not disclose such data in company-specific form unless directed to do so by the Commission.

D. Data Collection and Payments to Providers

23. *Comments.* In *TRS II*, the Commission proposed that TRS providers give the administrator true and accurate data necessary to compute payments to providers, including total TRS minutes of use, total interstate TRS minutes of use, TRS operating expenses, TRS interstate investment, and other information necessary to compute charges and payments to providers. Further, the Commission tentatively determined that TRS providers would be permitted to recover interstate TRS costs based on a national average TRS interstate minute of use rate.[23] In their comments, Sprint, USTA, Ameritech, MCI and NECA fully support the average national rate proposal because it encourages carriers and providers to develop cost-effective measures in order to meet or better the average compensation rate.[24] Further, the majority of commenters agree that all providers should report costs to the fund administrator as proposed, rather than have the administrator sample providers in order to establish the rate. All commenters agree that cost data submissions for the first year of the plan should be clarified with regard to the proposed requirements for notification of intent to receive payments from the TRS Fund. BellSouth contends that payments to providers should be based on actual costs, not on national average rates. DCPSC proposes a high cost fund subsidy for high cost TRS jurisdictions because, DCPSC argues, minute cost may increase if volume increases, and this may create a disincentive for the provision of quality TRS.[25]

24. In the proposed rules, the Commission defined TRS "minutes of use" as the minutes of use for completed calls beginning after call set-up and concluding after the last message call unit. *See TRS II*, Appendix D, Section 64.604(c)(4)(iii)(e). However, MCI proposes that the full cost of providing TRS minutes of use should include call attempts, ring-no-answer and busy signals, call set-up time, and caller information for first-time users because this would be functionally equivalent to network processing of voice calls. AT&T and the majority of commenters oppose MCI's proposal and recommend that administrative calls including handling billing inquiries, customer service and the provision of information be excluded from the definition of "minutes of use" because allowing for such compensation would create a perverse economic incentive for inefficiency by rewarding additional call set-up time.[26]

25. In its comments, NECA concurs with AT&T's contentions and further proposes that payments should only be available for calls that are actually billed to end-users. NECA further proposes that all TRS providers be required to submit true and accurate data to NECA, and that the Commission enable NECA to request that the Commission take action to investigate any alleged failure to comply with the rules. In its reply comments, NECA proposes that, except for the first year of the fund, the administrator file, on October 1, payment schedule formulas to be effective for one year periods beginning January 1. NECA asserts that this approach would lessen administrative burdens on NECA and TRS providers by reducing the number of data collections and filings to one per year. With regard to administrative costs, NECA proposes that the administrator recover its administrative expenses solely from the TRS Fund, before payments are disbursed from the Fund.

26. In its comments, NCLD proposes that payments should only be distributed to TRS providers that are in compliance with the minimum standards set forth in Section 64.604 of the Commission's rules. NYNEX, Hamilton and MCI propose that the Commission revise Section 64.604(c)(4)(iii)(f) to permit actual providers of state TRS programs to receive payments. Specifically, Hamilton proposes that the Commission modify the rule to reflect that state contract TRS providers selected by the state can submit data to NECA and NECA may make payments directly to that contractor.

27. In *TRS II*, the Commission proposed that TRS providers receiving payments shall be subject to Parts 32 and 36 of the Commission's rules for purposes of the TRS fund plan.[27] Many of the commenters propose that special guidelines be established for jurisdictional apportionment based on actual minutes of use because standard Part 36 categories identifying TRS service may not exist. Specifically, AT&T proposes that in lieu of reliance on Parts 32 and 36 procedures, the Commission should allow TRS providers to report to the administrator those costs that are incremental to the costs those carriers incur in providing intrastate TRS service. SWB contends that the separations rules contained in Parts 32 and 36 of the rules are understood and suitable and that AT&T's incremental cost proposal is flawed because it would shift the burden of support for the TRS infrastructure to the intrastate subscriber. Most commenters state that TRS providers should not be subject to the separations and accounting rules of Parts 32 and 36 because many providers have never been subject to these rules, and requiring them to be subject to these rules will increase the cost of providing TRS.[28] Instead, these commenters propose that the Commission's rules exclude TRS costs from the separations process and establish a simple allocation procedure. Many commenters concur with the alternative proposal of an abbreviated procedure, if it contains acceptable safeguards, in order to avoid heavy administrative burdens. NARUC disagrees with other commenters and urges the Commission to establish a Joint

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[23] *TRS II* at Appendix D, Section 64.604 (c)(4)(iii)(c) and (e).

[24] *See* Comments of Sprint at 5.

[25] The proposals of BellSouth and DCPSC received no support from other commenters to this proceeding.

[26] Reply comments of AT&T at 9.

[27] *TRS II*, Appendix D, Section 64.604 (c)(4)(iii)(e).

[28] *See e.g.*, Comments of AT&T, BellSouth, GCI, MCI, NECA, and McCaw.

Board, pursuant to Section 410(c) of the Act, or alternatively, establish an advisory committee pursuant to Section 410(b), to monitor the implementation of the ADA.

28. In its comments, NECA agrees that the imposition of Parts 32 and 36 accounting requirements on TRS providers will present significant administrative burdens for TRS providers, the administrator and the Commission. Because it may not be feasible for TRS providers to conform their accounts to this methodology, NECA proposes that a data request will establish comparable account definitions and procedures reasonably structured to meet TRS needs.[29] Sprint concurs with NECA's approach and proposes that Parts 32 and 36 requirements should not be imposed on TRS providers that do not currently use them.

29. *Decision*. Based upon the record before us, we first determine that TRS providers shall be permitted to recover interstate TRS costs based on a national average TRS interstate minutes of use rate. We are persuaded by commenters that the proposed rule defining "minutes of use" is appropriate and will encourage providers to develop efficient and cost-effective TRS programs. We note that "minutes of use" is used as the allocator for operator services in part 36 of the Commissions rules. Second, we find that payments shall only be available for interstate TRS calls that are placed by TRS users and that only TRS providers in compliance with the mandatory minimum standards set forth in Section 64.604 and specific eligibility set forth in Section 64.604 (c)(4)(iii)(f) of the Commission's rules shall be eligible for TRS Fund payments. These rules are designed to prevent double payment. We are persuaded by Hamilton and others to modify the rules to reflect that TRS providers selected by the state can submit data to the administrator and the administrator may make payments directly to those contractors.

30. Third, based on the record, we direct the administrator to fashion a form that is consistent with Parts 32 and 36 procedures reasonably tailored to meet the needs of TRS providers who would otherwise not be subject to part 32 of the rules. Further, we find that existing accounting and separations rules should be adequate to deal with the provision of interstate TRS by subject service providers and, therefore, a Joint Board proceeding at this time is unnecessary.[30] Lastly, TRS providers will report to the fund administrator accurate and true data as set forth in section 64.604, and the fund administrator shall use the data to calculate a national average TRS minutes of use rate in order to distribute payments to TRS providers. The rate calculated by the administrator shall be subject to Commission approval and the Commission shall have authority to audit providers and access to all data, including carrier specific data, collected by the fund administrator. The fund administrator shall have authority to audit TRS providers reporting data to the administrator.

IV. CONCLUSION

31. For the reasons set forth above, we conclude that the TRS Fund will create strong incentives for TRS providers to offer high quality, innovative services at reasonable cost. Moreover, by compensating TRS providers based on actual interstate relay minutes of use, TRS providers who provide excellent service to the public and generate strong demand for TRS will be reasonably compensated by all subscribers of every interstate service. We further conclude that the TRS Fund will further the goal of the ADA to provide functionally equivalent telephone service for all Americans.

V. PROCEDURAL MATTERS

32. *Final Regulatory Analysis:* Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. Section 601, *et seq.*, the Commission's final analysis in this *Third Report and Order* is as follows:

I. Need and purpose of this action:

This *Third Report and Order* further amends the Commission's rules to require that each common carrier engaged in interstate and/or intrastate telephone voice transmission services shall, no later than July 26, 1993, provide telecommunications relay services throughout the area in which it offers service. The rule amendments are required by the Americans with Disabilities Act of 1990, which, *inter alia*, added Section 225 to the Communications Act of 1934, as amended, 47 U.S.C. Section 225. The rules are intended to ensure that interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner, to all Americans.

II. Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:

No comments were submitted in direct response to the Regulatory Flexibility Analysis in the *Order on Reconsideration, Second Report and Order and Further Notice of Proposed Rulemaking.*

III. Significant alternatives considered:

The *Order on Reconsideration, Second Report and Order and Further Notice of Proposed Rulemaking* in this proceeding offered several proposals and requested comments as well as the views of commenters on other possibilities. The Commission has considered all comments, and has adopted most of its proposals in addition to some alternatives recommended by commenters. The Commission considers its *Third Report and Order* to be the most reasonable course of action under the mandate of Section 225 of the Communications Act, as amended. The

Secretary shall send a copy of this *Third Report and Order* including the certification to the Chief Counsel for Advocacy of the Small Business Administration in accor-

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[29] *See* Comments of NECA, Appendix C-10.

[30] Section 410(c) of the Communications Act of 1934, as amended, requires the Commission to refer to a Joint Board any proceeding regarding the jurisdictional separation of common carrier property and expenses between intrastate and interstate operations, which the Commission institutes pursuant to a notice of proposed rulemaking. We are not proposing any changes to the existing separations rules for subject carriers, and are requiring NECA's cost recovery form to be consistent with Parts 32 and 36. Finally, consistent with NARUC's views, we are directing NECA to establish an advisory committee, to include state regulatory officials.

dance with paragraph 603(A) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

VI. ORDERING CLAUSES

33. Accordingly, It is Ordered, That, pursuant to Sections 1, 4(i), 4(j), 201-205, 225 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 151, 154(i), 154(j), 201-205, 225 and 403, Part 64 of the Commission's Rules and Regulations IS AMENDED as set forth in Appendix B hereof, effective on the date a summary of this order is published in the Federal Register.[31]

34. It is Further Ordered, That the *TRS Fund Worksheet*, July 1993 is hereby adopted, and the worksheet will be published in the Federal Register.

35. It is Further Ordered, That, pursuant to the requirements of Section 604 of the Regulatory Flexibility Act, 5 U.S.C. 604, the Secretary shall cause a summary of this *Third Report and Order* to be published in the Federal Register which shall include a statement describing how members of the public may obtain such copies. The Secretary shall also provide a copy of this *Third Report and Order* to each state utility commission and to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

LIST OF COMMENTERS

Allnet Communications Services, Inc. (Allnet)**

America's Carriers Telecommunications Association (ACTA)

American Public Communications Council (APCC)*

American Telephone and Telegraph Company (AT&T)*

Ameritech Operating Companies (Ameritech)

Bell Atlantic Telephone Companies (BellAtlantic)*

BellSouth Corporation (BellSouth)*

Cellular, Inc. (Cellular)**

Cellular Telecommunications Industry Association (CTIA)*

Deafness Education Advocacy Foundation (DEAF)

District of Columbia Public Service Commission (DCPSC)

GE American Communications, Inc. (GE)*

General Communications, Inc. (GCI)

GTE Service Corporation (GTE)*

Hamilton Telephone Company (Hamilton)

McCaw Cellular Communications, Inc. (McCaw)**

MCI Telecommunications Corporation (MCI)*

National Association of Regulatory Utility Commissioners (NARUC)

National Center for Law and Deafness, Telecommunications for the Deaf, Inc. and the National Association of the Deaf (NCLD)*

National Exchange Carrier Association (NECA)*

New York Telephone Company and New England Telephone and Telegraph (NYNEX)*

Kenneth Robinson (Robinson)

Southwestern Bell (SWB)*

Sprint Corporation (Sprint)*

Telecommunications Resellers Association (TRA)

United States Telephone Association (USTA)*

* Filed Reply Comments
** Filed Reply Comments only

APPENDIX B

Part 64 of the Commission's Rules and Regulations (chapter 1 of Title 47 of the Code of Federal Regulations, part 64) is amended as follows:

PART 64 - MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

1. The authority citation for Part 64 continues to read as follows:

Authority: Section 4, 48 Stat. 1066, as amended; 47 U.S.C. 154, unless otherwise noted. Interpret or apply secs. 201, 218, 225, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 201, 218, 225 unless otherwise noted.

2. Section 64.604(c)(4) is amended to read as follows:

(c) Functional standards.

(1) * * *

(2) * * *

(3) * * *

(4) Jurisdictional separation of costs.

(i) * * *

(ii) * * *

[31] We find good cause for making the rule amendments effective on less than 30 days notice because Title IV of the ADA requires TRS implementation by July 26, 1993.

(iii) Telecommunications Relay Services Fund. Effective July 26, 1993, an Interstate Cost Recovery Plan, hereinafter referred to as the TRS Fund, shall be administered by an entity selected by the Commission (administrator). The initial administrator, for an interim period, will be the National Exchange Carrier Association, Inc.

(a) Contributions. Every carrier providing interstate telecommunications services shall contribute to the TRS Fund on the basis of its relative share of gross interstate revenues as described herein. Contributions shall be made by all carriers who provide interstate services, including, but not limited to, cellular telephone and paging, mobile radio, operator services, personal communications service (PCS), access (including subscriber line charges), alternative access and special access, packet-switched, WATS, 800, 900, message telephone service (MTS), private line, telex, telegraph, video, satellite, intraLATA, international and resale services.

(b) Contribution computations. Contributors' contribution to the TRS fund shall be the product of their subject revenues for the prior calendar year and a contribution factor determined annually by the Commission. The contribution factor shall be based on the ratio between expected TRS Fund expenses to total interstate revenues. In the event that contributions exceed TRS payments and administrative costs, the contribution factor for the following year will be adjusted by an appropriate amount, taking into consideration projected cost and usage changes. In the event that contributions are inadequate, the fund administrator may request authority from the Commission to borrow funds commercially, with such debt secured by future year contributions. Each subject carrier must contribute at least $100 per year. Service providers whose annual contributions total less than $1,200 must pay the entire contribution at the beginning of the contribution period. Service providers whose contributions total $1,200 or more may divide their contributions into equal monthly payments. Contributions shall be calculated and filed in accordance with a "TRS Fund Worksheet," which shall be published in the Federal Register. The worksheet sets forth information that must be provided by the contributor, the formula for computing the contribution, the manner of payment, and due dates for payments. The worksheet shall be certified to by an officer of the contributor, and subject to verification by the Commission or the administrator at the discretion of the Commission. Contributors' statements in the worksheet shall be subject to the provisions of Section 220 of the Communications Act of 1934, as amended. The fund administrator may bill contributors a separate assessment for reasonable administrative expenses and interest resulting from improper filing or overdue contributions.

(c) Data collection from TRS Providers. TRS providers shall provide the administrator with true and adequate data necessary to determine TRS fund revenue requirements and payments. TRS providers shall provide the administrator with the following: total TRS minutes of use, total interstate TRS minutes of use, total TRS operating expenses and total TRS investment in general accordance with Part 32 of the Communications Act, and other historical or projected information reasonably requested by the administrator for purposes of computing payments and revenue requirements. The administrator and the Commission shall have the authority to examine, verify and audit data received from TRS providers as necessary to assure the accuracy and integrity of fund payments.

(d) The TRS Fund will be subject to a yearly audit performed by an independent certified accounting firm or the Commission, or both.

(e) Payments to TRS Providers. TRS Fund payments shall be distributed to TRS providers based on formulas approved or modified by the Commission. The administrator shall file schedules of payment formulas with the Commission. Such formulas shall be designed to compensate TRS providers for reasonable costs of providing interstate TRS, and shall be subject to Commission approval. Such formulas shall be based on total monthly interstate TRS minutes of use. TRS minutes of use for purposes of interstate cost recovery under the TRS Fund are defined as the minutes of use for completed interstate TRS calls placed through the TRS center beginning after call set-up and concluding after the last message call unit. In addition to the data required under subsection (c) above, all TRS providers, including providers who are not interexchange carriers, local exchange carriers, or certified state relay providers, must submit reports of interstate TRS minutes of use to the administrator in order to receive payments. The administrator shall establish procedures to verify payment claims, and may suspend or delay payments to a TRS provider if the TRS provider fails to provide adequate verification of payment upon reasonable request, or if directed by the Commission to do so. TRS Fund administrator shall make payments only to eligible TRS providers operating pursuant to the mandatory minimum standards as required in Section 64.604, and after disbursements to the administrator for reasonable expenses incurred by it in connection with TRS Fund administration. TRS providers receiving payments shall file a form prescribed by the administrator. The administrator shall fashion a form that is consistent with Parts 32 and 36 procedures reasonably tailored to meet the needs of TRS providers. The Commission shall have authority to audit providers and have access to all data, including carrier specific data, collected by the fund administrator. The fund administrator shall have authority to audit TRS providers reporting data to the administrator.

(f) TRS providers eligible for receiving payments from the TRS Fund are:

(1) TRS facilities operated under contract with and/or by certified state TRS programs pursuant to Section 64.605; or

(2) TRS facilities owned by or operated under contract with a common carrier providing interstate services operated pursuant to Section 64.604; or

(3) interstate common carriers offering TRS pursuant to Section 64.604.

(g) Any eligible TRS provider as defined in section (f) of this section shall notify the administrator of its intent to participate in the TRS Fund thirty (30) days prior to submitting reports of TRS interstate minutes of use in order to receive payment settlements for interstate TRS, and failure to file may exclude the TRS provider from eligibility for the year.

(h) Administrator reporting, monitoring, and filing requirements. The administrator shall perform all filing and reporting functions required under Section 64.604 (c)(4)(iii)(a) through (j), inclusive. Beginning in 1994, TRS payment formulas and revenue requirements shall be filed with the Commission on October 1 of each year, to be effective for a one-year period beginning the following January 1. The administrator shall report annually to the Commission an itemization of monthly administrative costs

which shall consist of all expenses, receipts, and payments associated with the administration of TRS Fund. The administrator is required to keep the TRS Fund separate from all other funds administered by the administrator, shall file a cost allocation manual (CAM), and shall provide the Commission full access to all data collected pursuant to the administration of the TRS Fund. The administrator shall establish a non-paid, voluntary advisory committee of persons from the hearing and speech disability community, TRS users (voice and text telephone), interstate service providers, state regulatory representatives, and TRS providers, which will meet at reasonable intervals (at least semi-annually) in order to monitor TRS cost recovery matters. Each group shall select its own representative to the committee. The administrator's annual report shall include a discussion of advisory committee deliberations.

(i) Information filed with the administrator. The administrator shall keep all data obtained from contributors and TRS providers confidential, shall not use such data except for purposes of administering the TRS Fund, and shall not disclose such data in company-specific form unless directed to do so by the Commission. The Commission shall have access to all data reported to the administrator, and authority to audit TRS providers.

(j) The administrator's performance and this plan shall be reviewed by the Commission after two years.

(k) All parties providing services or contributions or receiving payments under this section are subject to the enforcement provisions specified in the Communications Act, the Americans with Disabilities Act, and the Commission's rules.

* * *

SEPARATE STATEMENT
OF
COMMISSIONER ANDREW C. BARRETT

Re: Telecommunications Relay Services, and the Americans with Disabilities Act of 1990 [CC Docket No. 90-571]

In this Third Report and Order, the Commission adopts a shared-funding mechanism to recover interstate telecommunications relay services (TRS) costs. My vote to adopt this item should not be misconstrued as indicating general support for shared-funding mechanisms. Rather, I believe their use should, in general, be limited to services with clearly identified social benefits, and to instances where other funding mechanisms would not adequately serve the public interest. Use of a shared-funding mechanism to recover TRS costs meets these tests.

My second concern is that the TRS fund be administered in as efficient, reliable and accountable a manner as possible. The National Exchange Carrier Association (NECA) will function as administrator of the TRS fund for an interim two year period. I support the Order's provisions that there be a full assessment of NECA's performance as interim administrator, and that there be full opportunity for other entities to be considered as permanent TRS fund administrator.

Appendix C: Calculation of the TRS Fund Contribution Factor

	Reportable Revenue (Millions)	% Interstate	Interstate Revenue (Millions)
Total Toll Revenue 1/	$71,803	55%	$39,492
Interstate Access 2/	$23,254	100%	$23,254
Cellular 3/	$5,131	14%	$718
Total Subject Revenue			$63,464
First Year Fund Requirement			$30
Contribution Rate 4/			0.00047

1/ 1991 Total toll service revenues from the "Long Distance Market", March 26, 1993 plus 3.5% annual growth. The 55% allocation is based on the ratio of interstate dial equipment minutes to total toll dial equipment minutes as reported in the "Monitoring Report", CC Docket No. 87-339, May 1993.

2/ From the 1991/1992 Statistics of Communications Common Carriers.

3/ 1990 Cellular and other radio telephone revenues reported in the "Annual Survey of Communications Services: 1990", by the U.S. Department of Commerce, plus 20% annual growth. The 14% allocation is based on the ratio of interstate dial equipment minutes to total dial equipment minutes.

4/ Carriers with interstate revenues of less than $212 thousand will pay $100. Carriers with interstate revenues exceeding $2539 thousand can pay monthly.

Appendix D

TRS Fund Worksheet

Subject to OMB approval

Expires
Estimated Average
Burden Hours Per
Response: 2 hours.

Instructions for Completing the Worksheet for Calculating and Filing Carrier Contributions to fund Interstate Telecommunications Relay Service (TRS). July 1993

NOTICE TO INDIVIDUALS

Section 64.604(c)(4)(iii) of the Commission's Rules requires all carriers providing interstate service to complete this worksheet and to contribute funding for interstate Telecommunications Relay Services (TRS). The collection of information and fees stems from the Commission's authority under the Communications Act of 1934, Sections 4, 48, 48 Stat. 1066, as amended, 47 U.S.C. 154 unless otherwise noted. Interpret or apply Sections 201, 211, 218, 219, 220, 225 48 Stat. 1073, 1077, as amended; 47 U.S.C. 201, 211, 218, 219, 220, 225. The data in the report will be used to ensure that carriers properly fund interstate TRS. Selected information provided in the worksheet will be made available to the public in a manner consistent with the Commission's Rules. All carriers providing interstate telecommunications service must file this worksheet.

The foregoing Notice is required by the Privacy Act of 1974, P.L. 93.579, December 31, 1974, 5 U.S.C. 552(a)(e)(3), and the Paperwork Reduction Act of 1980. P.L. 96-511, Section 3504(c)(3).

Public reporting burden for this collection of information is estimated to average 2 hours per response including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the reporting burden to the Federal Communications Commission,

Office of Managing Director, Washington, DC 20554, and the Office of Information and Regulatory Affairs, Office of Management and Budget, Paperwork Reduction project (3060), Washington, DC 20503.

I. Introduction.

On July 15, 1993, the Commission adopted rules that require all providers of interstate telecommunications services to contribute to the provision of TRS based on their proportionate share of gross interstate revenues. Section 64.604(c)(4)(iii) directs carriers to calculate and file their contribution in accordance with TRS Fund Worksheet.

> ... Contributions shall be calculated and filed in accordance with a "TRS Fund Worksheet", which will be prepared and published in the Federal Register. The worksheet sets forth information that must be provided by the contributor, the formula for computing the contribution, the manner of payment, and due dates for payments.

II. Filing Requirements and General Instructions.

A. Who must file.

All common carriers providing interstate telecommunications services within the United States must file this worksheet. For this purpose, the United States is defined as the conterminous United States, Alaska, Hawaii, American Samoa, Baker Island, Guam, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Island, Navassa Island, the Northern Mariana Islands, Palmyra, Puerto Rico, the U.S. Virgin Islands, and Wake Island.

For the purpose of calculating TRS contributions, interstate telecommunications service includes, but is not limited to the interstate portion of the following types of services: cellular telephone and paging, mobile radio,

operator services, personal communications service (PCS), access (including Subscriber Line Charges), alternative access and special access, packet-switched, WATS, 800, 900, message telephone service (MTS), private line, telex, telegraph, video, satellite, international, intraLATA, and resale services. **Carriers that provide only intrastate service need not file.** Note, however, that all local exchange carriers provide interstate access services, and must file.

Entities may not file summary reports for more than one carrier. Each legal entity that provides interstate telecommunications service must file separately. All affiliates or subsidiaries should identify the ultimate controlling parent or entity in Block 1, Line (1-b) -- Holding Company.

B. When and Where to File

The 1993 TRS contribution period will fund interstate TRS provided between July 26, 1993 and April 30, 1994. Monthly contributions for the 1993 TRS contribution period must be received by the 26th of each month for September 1993 through March 1994. A revised TRS Worksheet will be released for the 1994 TRS contribution period. The revised TRS Worksheet will have instructions for payments due April 26, 1994 through March 26, 1995.

The legal name of the carrier should be shown on all checks exactly as it appears on the completed TRS Fund Worksheet. **Do not mail the TRS worksheet or TRS contribution checks to the FCC.** Payments must be received by the FCC TRS Fund Administrator -- the National Exchange Carrier Association (NECA) -- no later than the dates indicated below. The filing schedule is as follows:

Mailing Address	Worksheet Due September 26, 1993	Payments Due September 26, 1993 through March 26, 1993 *
NECA TRS P.O. Box 360090 Pittsburgh, PA 15251-6090		Check **
NECA FCC TRS Fund Administration 100 South Jefferson Rd. Whippany, NJ 07981 Telephone: 201-884-8000	Completed Worksheet	Photocopy of check **

* Carriers whose total 1993 TRS contribution is less than $1200 must pay the total amount to the FCC TRS Fund Administrator no later than September 26, 1993. Carriers whose total 1993 TRS contribution is $1200 or greater may elect to make seven equal monthly payments with the first payment due to the FCC TRS Fund Administrator no later than September 26, 1993.

** Carriers are encouraged to contact the FCC TRS Fund Administrator to make arrangements for Electronic Funds Transfer.

C. Rounding of Numbers

All information provided in the worksheet, except the signature, should be neatly printed in ink or typed. Reported revenues in block 2, column (b) may be rounded to the nearest thousand dollars. Regardless of rounding, **all dollar amounts must be reported in whole dollars.** For example, $2,271,881.93 could be reported as $2,271,882 or as $2,272,000, but could not be reported as $2272 thousand or $2.272 million.

Percentages reported in block 2, column (c) should be rounded to the nearest whole percent. For example, if the ratio of interstate to total revenue was .4269155, then the figure 43% should be reported. Percentages between 0% and 1% should be reported as 1%.

Interstate revenues are calculated as total revenues in column (b) times the percentage shown in column (c). Calculated interstate revenues should be rounded to the nearest whole dollar and entered in column (e). Similarly, the total contribution (block 3, line (18)) and amounts enclosed with the filing (block 3, line (19)) should be rounded to the nearest whole dollar.

D. Compliance

Carriers failing to file the TRS Worksheet in a timely fashion are subject to the fines prescribed in Section 219(b) of the Communications Act of 1934 (the Act). Carriers filing false information are subject to fines or imprisonment as specified in Section 220(e) of the Act. Carriers failing to contribute in a timely fashion are subject to fines prescribed in Section 503(b) of the Act. In addition, Section 64.604(c)(4) of the Commission's Rules authorizes the FCC Fund Administrator to bill a carrier for reasonable costs, including legal fees, that are caused by improper filing of the worksheet or overdue TRS contributions.

III. Specific Instructions.

A. Block 1: Carrier Identification

Block 1 of the TRS Fund Worksheet requires identification information, including: the legal name of the carrier; the holding company or controlling entity, if any; the principal name under which the company conducts carrier activities; and, the complete mailing address of the corporate headquarters. In addition, Block 1 requests a telephone number that can be used for customer inquiries. Information provided in Block 1 will be published by the Common Carrier Bureau in the "Long Distance Carrier Locator".

B. Block 2: Carrier revenue for calendar year 1992

1. Column (b)

Provide gross revenues for all telecommunications services. Gross revenues consist of total revenues billed to customers with no allowances for uncollectibles. For international services, gross revenues consist of gross revenues billed by U.S. carriers with no allowances for settlement payments. Gross revenues should also include any surcharges on communications services that are billed to the customer and either retained by the carrier or remitted to a non-government third party under contract. Gross revenues should exclude taxes and any surcharges that are not recorded as revenue, but which are instead remitted to government bodies.

Report carrier revenues using the categories shown in column (a) of Block 2. Carriers required to use the Uniform System of Accounts (USOA) prescribed in Part 32 of the Commission's rules should base their response on their USOA account data. Other carriers should divide gross revenues based on the following descriptions.

Line (5) -- Local exchange service -- should include the basic local service revenues of local exchange carriers except for local private line revenue, access revenues, and revenues from providing mobile or cellular services to the public. Line (5) should include Account 5001 -- basic area revenue; Account 5002 -- Optional extended area revenue; Account 5003 -- Cellular mobile revenue (revenue to the local exchange carrier for messages between a cellular customer and another station within the mobile service area); Account 5050 -- Customer premises revenue; Account 5060 -- Other local exchange revenue; and, Account 5069 -- Other local exchange revenue settlements. Line (5) should also include amounts in Account 5004 -- Other mobile services revenue -- that were derived from connecting with mobile service carriers.

Line (6) -- Local private line service -- should include revenues from providing local services that involve dedicated circuits, private switching arrangements and/or predefined transmission paths. Line (6) should include amounts recorded in Account 5040 -- Local private line revenue.

Line (7) -- Mobile radio, cellular, and paging -- should include revenues from the provision of mobile radio, cellular, and paging services to the public. Line (7)

should also include amounts in Account 5004 -- Other mobile services revenue -- that were derived from providing service directly to the public.

Line (8) -- Alternative access, PCS & other -- should include all other local service revenues, including revenues for competitive access providers, personal communications services (PCS), etc. Line (8) should include Account 5200 -- Miscellaneous revenue.

Long distance revenues include intrastate, interstate, and international long distance services. Divide long distance revenues between access service, operator service, other switched service, long distance private line services, and all other long distance services.

Line (9) -- Interstate access -- should include revenues in Account 5081 -- End User revenue; Account 5082 -- Switched access revenue; and, Account 5083 -- Special access revenue. Only local exchange carriers should be reporting data in line (9).

Line (10) -- Intrastate access -- should include revenues in Account 5084 -- State access revenue. Only local exchange carriers should be reporting data in line (10).

Line (11) -- Operator service -- should include all credit card calls, person to person calls, and calls with alternative billing arrangements such as third number billing and collect calls. Operator service revenues should include all toll traffic from coin, accommodation and prison telephones.

Line (12) -- Non-operator switched toll service -- should include amounts from Account 5100 -- Long distance message revenue -- except for amounts reported in Line (11). Line 12 includes WATS, 800, 900, "WATS like" and similar service.

Line (13) -- Long distance private line service -- should include revenue from dedicated circuits, private switching arrangements, and/or predefined transmission paths, extending beyond the basic service area. Line (13) should include Account 5120 -- Long distance private network revenue.

Line (14) -- All other long distance -- should include all other revenues from providing long distance communications services. Line (14) should include Account 5160 -- Other long distance revenue.

Total the figures in column (b) for Line (5) through Line (14) and enter this amount in Line (15b). This should represent the total communications revenues for the company.

2. Column (c) and Column (d)

For each entry in Line (5) through Line (14), estimate the percentage of revenues in column (b) that are for interstate and/or international service, and enter this percentage in Column (c). Interstate revenues include all revenues received for calls that do not originate and terminate in the same state. For example, if a cellular carrier collects a fixed amount of revenue per minute of traffic, and 10% of minutes are interstate, then interstate revenues would include 10% of the per minute revenues.

Wherever possible, carriers should calculate the percentage of total revenues that are interstate by using information from their books of accounts and other internal data reporting systems. Carriers who cannot calculate a percentage by using information from their books of accounts and other internal data reporting systems, may elect to rely on a special study to estimate the percentages. Place a check mark in Column (d) if the percentage shown in column (c) was based on a special study.

3. Column (e)

Multiply the gross revenues reported in column (b) by the interstate percentages reported in column (c), putting the results in column (e). The sum of the figures in column (e), lines (5) through (14), should be entered in line (15e).

C. Block 3: Calculation of Contribution

Use block 3 in the worksheet to calculate the TRS contribution for the period July 1993 through April 1994. Total interstate revenues from line (15e) should be

copied to line (16). This amount must be multiplied by the Contribution Rate shown in line (17), with the result entered in line (18). The contribution rate is 0.00047 for the 1993 filing year.

If the result of the calculation is less than $100, then the total contribution for the period July 1993 through March 1994 is $100. If the total contribution is less than $1,200, then the carrier should remit the total contribution with the worksheet. If the total liability is equal to or greater than $1,200, then the carrier may elect to make 7 equal monthly payments. The monthly contribution should be calculated as the amount in line (18) divided by 7.0, rounded to the nearest whole dollar. Enter the amount of the September 26, 1993 fund contribution in line (19). If the carrier elects to make monthly contributions, the six additional monthly contributions must be received by the 26th of succeeding months, October 1993 through March 1994.

Section II - B above provides directions for mailing the completed TRS Fund Worksheet and checks for amounts due to the FCC Fund Administrator. Carriers who check the box in line (19) will receive monthly payment reminders. These reminders will be mailed to the address shown in line (3). Failure to receive a reminder notice will not justify late payment.

The seven payment schedule specified above is adopted for transition purposes. On April 26, 1994, carriers will file a worksheet using data for calendar 1993. Carriers whose contributions are $1,200 or greater will be allowed to make 12 equal payments to fund TRS for May 1994 through April 1995.

D. Block 4: Certification.

An officer of the fund contributor must examine the data provided in the TRS Fund Worksheet and certify that the information provided therein is accurate. In addition, the fund contributor should provide the name of a contact person who can provide clarifications, if necessary, and who could serve as the first point of contact in the event that either the FCC or the FCC Fund Administrator should choose to audit information provided by the company.

Appendix D

Annual TRS Fund Worksheet

Subject to OMB Approval Expires

(Please read instructions before completing) Estimated Average Burden Hours Per Response: 2 hours

Block 1: Carrier Identification

1a Legal Name of Carrier	
1b Holding Company	
2 Principal Name for Carrier Activities	
3 Complete Mailing Address of Carrier Corporate Headquarters	
4 Telephone # for Customer Inquiries	( ) -

Block 2: Carrier revenue for calendar year 1992

(a)	Gross Revenues (b)	% interstate (c)	Special study (d)	Interstate Revenues (e) = (b) x (c)
Local Services				
5 Local exchange service	$	%		$
6 Local private line service	$	%		$
7 Mobile radio, cellular, and paging	$	%		$
8 Alternative access, PCS & other	$	%		$
Long Distance				
9 Interstate access	$	100 %		$
10 Intrastate access	$	0 %		$ 0
11 Operator service	$	%		$
12 Non-operator switched toll service	$	%		$
13 Long distance private line service	$	%		$
14 All other long distance	$	%		$
15 Total lines 5 through 14	$			$

Block 3: Calculation of Contribution

16 Interstate Revenues from Line 15e	$
17 Contribution Rate:	x 0.00047
18 Total CONTRIBUTION for July 1993 through March 1994: line 16 x line 17 [if line 16 is greater than $0 then the minimum contribution is $100]	$
19 Contribution to be paid this month: [Enter the amount from line 18 if it is less than $1200. Otherwise, the contributor may divide line 18 by 7.0 to calculate equal monthly contributions.] Check here for monthly billing reminders ----------> ☐	$

Block 4: CERTIFICATION

I certify that I am an officer of the carrier named above, that I have examined the foregoing report and that to the best of my knowledge, information and belief, all statements of fact contained in this worksheet are true and that said worksheet is an accurate statement of the affairs of the above named carrier for the period January 1, 1992 through December 31, 1992.

20 Printed Name of Officer	
21 Position with carrier	
22 Signature	
23 Date	
24 Contact Person	
25 Telephone Number of Contact Person	( ) -

Mail checks to: NECA TRS P.O. Box 360090 Pittsburgh, PA 15251-6090 For additional information call NECA 202-884-8000

Mail worksheet and photocopy of checks to: NECA - FCC TRS Fund Administration 100 South Jefferson Rd. Whippany, NJ 07981

Persons making willful false statements in the worksheet can be punished by fine or imprisonment under the Communications Act, 47 U.S.C. 220 (e).

FCC 431
July 1993

July 15, 1993

SEPARATE STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

Re: Telecommunications Relay Services, and the Americans with Disabilities Act of 1990 [CC Docket No. 90-571]

In this Third Report and Order, the Commission adopts a shared-funding mechanism to recover interstate telecommunications relay services (TRS) costs. My vote to adopt this item should not be misconstrued as indicating general support for shared-funding mechanisms. Rather, I believe their use should, in general, be limited to services with clearly identified social benefits, and to instances where other funding mechanisms would not adequately serve the public interest. Use of a shared-funding mechanism to recover TRS costs meets these tests.

My second concern is that the TRS fund be administered in as efficient, reliable and accountable a manner as possible. The National Exchange Carrier Association (NECA) will function as administrator of the TRS fund for an interim two year period. I support the Order's provisions that there be a full assessment of NECA's performance as interim administrator, and that there be full opportunity for other entities to be considered as permanent TRS fund administrator.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-8

In the Matter of

Implementation of Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992

Home Shopping Station Issues

REPORT AND ORDER

Adopted: July 2, 1993; Released: July 19, 1993

By the Commission: Chairman Quello issuing a separate statement; Commissioner Barrett issuing a separate statement; Commissioner Duggan dissenting with a separate statement.

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INTRODUCTION

1. By this *Report and Order*, the Commission adopts the rules and policies needed to implement the provision of the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992" or "1992 Cable Act")[1] relating to stations that are predominantly utilized for the transmission of sales presentations or program length commercials ("home shopping stations") and issues regarding the carriage of such stations on cable systems.

2. On January 14, 1993, the Commission adopted a *Notice of Proposed Rulemaking* in this proceeding, commencing the implementation of Section 4(g) of the Cable Act of 1992.[2] That section of the 1992 Cable Act added a new Section 614(g) to the Communications Act of 1934, as amended, 47 U.S.C. Sec. 533(g), which requires the Commission to determine, regardless of prior proceedings, whether home shopping broadcast stations are serving the public interest, convenience, and necessity. That section further provides that the Commission shall consider in making this determination the viewing of home shopping stations, the level of competing demands for the spectrum allocated to such stations, and the role of such stations in providing competition to nonbroadcast services offering similar programming. The 1992 Cable Act further requires that if the Commission finds that these stations do serve the public interest, then it shall qualify them as local commercial television stations for the purposes of subsection (a), i.e., must-carry.[3] If the Commission finds that one or more such stations do not serve the public interest, then the Act requires that the Commission provide them with reasonable time to provide different programming. The overwhelming majority of comments in this proceeding contend that home shopping broadcast stations do serve the public interest, that their programming format does not adversely affect their renewal expectancy, and that they should be eligible for mandatory cable carriage. Based on the record before us, we conclude that home shopping stations serve the public interest, and we thereby qualify them as local commercial television stations for the purposes of mandatory cable carriage.[4]

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[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[2] *Notice of Proposed Rulemaking* in MM Docket No. 93-8 (*Notice*), 8 FCC Rcd 660 (1993). The Commission received 58 Comments and nine replies in response to the *Notice*. Appendix A contains a list of commenters.

[3] The Commission recently adopted rules concerning the mandatory cable carriage of television broadcast stations in general. *Report and Order* in MM Docket No. 92-259 (*Broadcast Signal Carriage Issues*), 8 FCC Rcd 2965 (1993). In that proceeding, we defined on an interim basis stations that are predominantly utilized for sales presentations and program length commercials as stations devoting more than 50% of their programming to such commercial material. *Id.* at 2984.

[4] A number of commenters set forth proposed definitions for the term "predominantly utilized" as used in Section 4(g) of the 1992 Cable Act. For example, the Center for the Study of Commercialism (CSC) suggests that the Commission define the term so as to give special attention to long-form programming addressing minority or otherwise unmet community programming needs. CSC Reply at 14. However, based on our conclusions in this proceeding, the question of how to define, for the purpose of cable carriage, those stations that are predominantly

ARE HOME SHOPPING STATIONS SERVING THE "PUBLIC INTEREST, CONVENIENCE, AND NECESSITY?"

The Three Statutory Factors

3. In this proceeding the Commission must evaluate, "notwithstanding prior proceedings," whether home shopping stations are now serving the public interest, convenience, and necessity.[5] In making this judgment, the 1992 Cable Act directs us to consider three specific factors: (1) the viewing of home shopping stations by the public; (2) the level of competing demands for the spectrum allocated to such stations; and (3) the role of such stations in providing competition to nonbroadcast services offering similar programming.

4. *Viewership.* Addressing the first of these factors, the *Notice* sought comment on the viewing of home shopping broadcast stations. To the extent data on the viewership (or "ratings") of such stations may not generally be reported, we asked how we can best determine the levels of viewership of home shopping broadcast stations.[6] Although commenters did not present specific ratings data,[7] several argued that conventional ratings are not the most appropriate method for ascertaining viewership. For example, the National Association of Broadcasters (NAB) and the National Association of Black Owned Broadcasters, Inc. (NABOB) assert that the quantity of viewers of a service does not reflect the importance of that service to those viewers.[8]

5. Several commenters suggested that the best way to gauge the viewership of home shopping stations is to determine how many people purchase the products sold by such stations.[9] Silver King[10] claims that seven to 15% of the television households in each of its markets (or approximately 27,526,600 households) are members of the Home Shopping Club.[11] Silver King and HSN add that, because more people watch than make purchases, these figures demonstrate that home shopping stations have substantial audiences.[12] A number of commenters contend that additional evidence of significant viewership of home shopping stations is their inception and rapid growth since 1984, when the format was first allowed.[13] In that regard, HSN states that its programming is carried "full time" by 35 television stations and part time by approximately 70 television stations, reflecting significant public acceptance for a format that did not exist a decade ago.[14] Furthermore, National Infomercial Marketing Association (NIMA) claims that the infomercial industry[15] has grown from product sales of $10 million in 1984 to over $750 million in 1992, at least half of which is attributable to broadcast infomercials.[16]

6. Based on the information before us, and with no quantifiable data demonstrating otherwise, we conclude that home shopping stations have significant viewership. Moreover, we agree with the commenters who state that the format's continued success and expansion would not likely occur without significant viewer support.[17] Having found that the first of the three Congressionally mandated factors suggests that home shopping stations are qualified for must-carry rights, we now turn to the second criterion.

7. *Competing Demands for the Spectrum.* The second factor on which we sought comment involves the level of competing demands for the spectrum allocated to home shopping stations. As an initial matter, we asked whether the 1992 Cable Act directs the Commission to consider the demands only of other television broadcasters or, more generally, those of applicants, permittees, and licensees in other services (such as land mobile and advanced television).[18] Commenters are divided on this matter. Several commenters argue that Congress did not intend for the Commission to reallocate spectrum from the broadcast service as a result of this proceeding. For example, NAB states that, by directing the Commission to allow home shopping licensees to develop other broadcast formats if their stations were found not to serve the public interest, Congress contemplated only broadcast uses for those channels.[19] Several other commenters also contend that this proceeding is not the appropriate forum to consider spectrum reallocation, because there is nothing unique about the spectrum (as opposed to the programming) utilized by home shopping stations.[20] On the other hand, CSC states that the plain language of the statute, as well as the legislative history, compels the broader interpretation.[21] In that regard, CSC

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utilized for home shopping is moot. Accordingly, we are eliminating the interim definition that we previously adopted. *Broadcast Signal Carriage Issues* at 2984.

[5] 47 U.S.C. Sec. 534(g)(2).

[6] *Notice* at 661.

[7] For example, although CSC implies that home shopping stations have low ratings, CSC Comments at 15, it does not supply data that support such a conclusion.

[8] NAB Comments at 7; NABOB Comments at 4.

[9] Silver King Communications, Inc. (Silver King) Comments at 44-45; Home Shopping Network, Inc. (HSN) Comments at 34-35.

[10] Silver King is the licensee of 12 stations that devote most of their broadcast day to HSN's programming.

[11] Silver King Comments at 46. Silver King states that purchasers of its products are automatically enrolled as members of the Home Shopping Club. *Id.* at 8, n.11.

[12] *Id.* at 46; HSN Comments at 34-35.

[13] NAB Comments at 7-8; Silver King Comments at 45-46; HSN Comments at 33-34. In 1984, the Commission eliminated restrictions on the amount of commercial programming a station could broadcast, thereby making possible the home shopping format. *Report and Order* in MM Docket No. 83-670 (*Television Deregulation*), 98 FCC 2d 1076 (1984).

[14] HSN Comments at 33.

[15] NIMA defines an infomercial as a program-length commercial presentation that is usually 30 minutes in length. NIMA Comments at 2.

[16] *Id.* at 2, 5-6.

[17] In the *Notice*, we noted the possible First Amendment implications of basing our public interest determination on the popularity of a programming format. *Notice* at 661. However, Congress expressly directed the Commission to consider the viewing of home shopping stations in this proceeding. Accordingly, we lack the discretion to exclude this factor from our analysis. *See Johnson v. Robison*, 415 U.S. 361, 368 (1974). Even if we were to exclude this factor, however, we would still find, based on the other factors discussed below, that such stations serve the public interest.

[18] *Id.* at 661.

[19] NAB Comments at 8.

[20] Silver King Comments at 47-48; Miller Broadcasting, Inc. (Miller) Comments at 15; HSN Comments at 36.

[21] CSC Reply at 20-21.

argues that the spectrum could be better used for public safety, emergency, or high definition television use, as well as for traditional television broadcasting.[22]

8. We disagree with CSC's interpretation of the plain language of the statute and its legislative history. We do not believe that Congress intended for us to consider the demands of other nonbroadcast services in this proceeding. In support of its position, CSC's only citation to the legislative history is an exchange between Representatives Eckart and Dingell, in which they affirm that the Commission "should consider the scarcity of broadcasting frequencies" in making the public interest determination.[23] We reject CSC's claim that this exchange demonstrates Congress's intent that we consider the demands of other, nonbroadcast services. If anything, in discussing the scarcity of broadcasting frequencies, this exchange would imply a concern with spectrum scarcity for broadcasters and whether home shopping stations were precluding other potential broadcasters from the scarce spectrum. We also agree with those commenters who assert that there is nothing unique about the spectrum now utilized by home shopping stations that justifies a reallocation inquiry. Finally, we believe that by directing the Commission to allow home shopping licensees to develop other broadcast formats if their stations were found not to serve the public interest, Congress contemplated only broadcast uses for those channels. Accordingly, we shall interpret the second criterion to refer only to competing demands of other television broadcasters. We believe that our interpretation is fully consistent with Congress's clearly expressed intent that we take into consideration the scarcity of the spectrum.

9. In the *Notice* we observed that, in accordance with Section 307 of the Communications Act of 1934, as amended, the licensees of home shopping stations, like those of all other television broadcast stations, must demonstrate every five years to the Commission that the public interest will be served by renewal of their licenses.[24] We also stated that home shopping stations already have the same fundamental obligation as other broadcast stations to provide programming that responds to issues of concern to their communities of license, as well as programming that serves the needs and interests of children. Moreover, we noted that any party qualified to hold a Commission license can file a competing application against the renewal of a home shopping station licensee, giving the challenger the opportunity to replace the existing licensee, should that be in the public interest. We therefore asked commenters to address whether the existing Congressionally mandated license renewal scheme adequately takes into account the competing demands of applicants for the television broadcast spectrum.[25]

10. Several commenters addressed this aspect of our inquiry in the affirmative.[26] HSN, for example, states that a competing application against a license renewal is the best indicator of any competing demand for the particular spectrum.[27] In that regard, HSN notes that such an application has been filed against the renewal of an HSN-affiliated station on only one occasion, and the station's license was renewed.[28] NAB asserts that the fact that no home shopping station has been denied renewal demonstrates either that there is little competing demand for the spectrum, or that home shopping stations have been able to demonstrate that they are serving the public interest.[29] Moreover, a significant number of licensees note that the only factor that allowed them to complete the construction of their stations or to keep them from going dark was the financial assistance that affiliation agreements with HSN provided.[30] INORITY HSN and Silver King claim that the Commission can therefore conclude that there are no competing broadcast demands for those channels.[31]

11. In response, CSC argues that there may now be competing demands for those channels, even if none existed when the affiliation agreements were negotiated.[32] Further, CSC states that applicants face extraordinary hurdles that prevent them from filing competing applications against a license renewal. Specifically, according to CSC, renewal expectancy and limitations on settlements make renewal challenges costly and futile.[33]

12. Based on the evidence before us, we conclude that the existing renewal system, as well as the initial licensing process, adequately takes into account the competing demands of television broadcasters for the television broadcast spectrum. Moreover, we find the lack of competing applications against the renewal of home shopping stations to be a compelling indication that the level of competing demands for the spectrum utilized by home shopping stations is minimal.

13. *Competition with Nonbroadcast Home Shopping Services.* The third factor the Cable Act of 1992 requires us to consider is the role of home shopping stations in providing competition to nonbroadcast services offering similar programming.[34] We stated in the *Notice* that two aspects of the competitive relationship appear to be implicated in addressing this statutory factor. First, we asked whether

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[22] CSC Comments at 16-17.

[23] CSC Reply at 21, citing 138 Cong. Rec. E2908 (October 2, 1992).

[24] 47 C.F.R. Sec. 73.1020(a).

[25] *Notice* at 661.

[26] Silver King Comments at 49-50; NIMA Comments at 7-8; NAB Comments at 8-9; Direct Marketing Association (DMA) Comments at 4; Miller Comments at 15.

[27] HSN Comments at 37-38.

[28] *Id.* at 37, n.50.

[29] NAB Comments at 9.

[30] INORITY2TV-49, Inc. (TV-49) Comments at 2-5; Jovon Broadcasting Corporation (Jovon) Comments at 2-4; Roberts Broadcasting Company (Roberts) Comments at 1; Pan Pacific Television, Inc. (Pan Pacific) Comments at 3; Ponce-Nicasio Broadcasting, Inc. (Ponce-Nicasio) Comments at 3-4. All of the above are minority-controlled licensees. Several non-minority-controlled licensees make the same assertion. Video Mall Communications, Inc. (Video Mall) Comments at 1.1-1.4; KX Acquisition LP (KX) Comments at 3-4; Miller Comments at 3-5.

[31] Silver King Comments at 48-49; HSN Comments at 36-37.

[32] CSC Reply at 21.

[33] *Id.* at 21-22, citing "TV License Renewals Since Oct. 1991," *Broadcasting Magazine*, April 12, 1993 at 62 (stating that from October, 1991, only 11 competing applications were filed against 674 renewal applications). However, we note that we instituted the settlement agreement policy which CSC cites in order to prevent abuse by non *bona fide* challengers, while preserving the right to file a competing application for legitimate applicants. *First Report and Order* in BC Docket 81-742 (*Abuses of the Renewal Process)*, 4 FCC Rcd 4780 (1989), *recon. granted in part and denied in part*, 5 FCC Rcd 3902 (1990).

[34] CSC asserts that Congress's concern with competition is not applicable to home shopping services. Citing Congressional findings (set forth in Sections 2(a)(9)-(11) of the 1992 Cable Act)

broadcast services suffer from potential commercial disadvantages as a result of their Commission-imposed public interest obligations, and whether a conclusion that broadcast home shopping stations are operating in the public interest (thus entitling them to local cable carriage) is an appropriate response to any competitive disparity that may exist.[35] The second aspect involves the question of the public interest in providing cable subscribers with competitive home shopping options.[36]

14. Few commenters chose to address the first issue. Mike Rozman and Janet Taylor (Rozman and Taylor) and Miller assert that broadcasters' public interest obligations do create a commercial disadvantage, although they provide no substantiation of that claim.[37] Miller adds that entitlement to local cable carriage would reduce the disadvantage.[38] The National Cable Television Association, Inc. (NCTA), on the other hand, states that the broadcast license system creates a commercial disadvantage for cable programmers, rather than for home shopping station licensees. According to NCTA, the costs of all broadcasters' public interest obligations is vastly outweighed by their free use of the spectrum, which allows licensees free access to the public.[39] NCTA contrasts this with the competitive environment for cable programmers, whose only access to their intended audience is through negotiated carriage agreements with cable and other video programming distributors.[40] DMA asserts that competition with nonbroadcast program providers is too narrow a criterion, because home shopping stations compete with virtually all other advertising distribution media, including magazines, newspapers, direct mail, and telephone marketing.[41] In that regard, DMA alleges than none of these alternative media is subject to statutory public interest obligations, and that a determination against home shopping stations would alter competition in the direct marketing business to the detriment of the consumer.[42]

15. The *Notice* invited commenters to address specific public interest obligations that broadcasters must meet and the manner in which those requirements may create a commercial imbalance with nonbroadcast program providers.[43] We provided as possible examples the Commission rules that regulate the location of a station's main studio and that allot channels to particular, often small, communities.[44] However, the limited comments addressing this issue are conclusory and unsupported by substantiating data. Thus, they do not provide information upon which we can rely in determining whether broadcast stations do in fact suffer from potential commercial disadvantages as a result of their Commission-imposed public interest obligations.

16. The second aspect of the competitive analysis, as we stated in the *Notice*, involves the question of the public interest in providing competitive home shopping options to television viewers.[45] The *Notice* observed that competition could be affected by a cable operator's having either an ownership or a contractual interest in a nonbroadcast provider of home shopping programming.[46] We therefore sought comment on whether cable operators with either ownership or contractual interests in nonbroadcast providers of home shopping programming have elected not to carry home shopping broadcast stations or have treated such stations less favorably than nonbroadcast home shopping services with which they are affiliated. We also requested comment on whether any such carriage decisions have resulted in stifling competition and reducing the viewing choices of the public.[47]

17. With regard to the matters raised, several commenters allege that cable systems frequently and unfairly discriminate against home shopping broadcast stations,[48] while others claim that no such discrimination occurs. For example, NCTA asserts that cable systems may choose not to carry broadcast home shopping stations because their programming generally duplicates that of a channel already available on cable, making the broadcast station's programming significantly less desirable.[49] NCTA adds that, to the extent that cable systems may favor nonbroadcast home shopping providers in which they have an interest, the proper solution is enforcement of antitrust laws, rather than mandatory carriage.[50] Continental Cablevision, Inc. (Continental) contends that many cable operators with an ownership interest in nonbroadcast home shopping programmers also carry home shopping programming provided by entities in which they have no interest.[51] Continental adds that, although it has an ownership inter-

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that broadcast television provides important programming not generally available on cable channels. CSC alleges that Congress is not concerned with broadcast programming that is duplicated on cable; CSC so classifies home shopping programming. CSC Comments at 17. We disagree, because Section 4(g)(2) of the Act expressly directs the Commission to consider the role of home shopping broadcast stations in providing competition with nonbroadcast services offering similar programming.

35 *Notice* at 661.

36 *Id.*

37 Rozman and Taylor Comments at 6; Miller Comments at 16.

38 *Id.*

39 NCTA Comments at 9. This sentiment is echoed by Miller, which states that the public service obligations are a small price to pay for free use of the spectrum. Miller Comments at 16.

40 NCTA Comments at 9.

41 DMA Comments at 5.

42 *Id.*

43 *Notice* at 661.

44 *Id.* at n.13.

45 *Id.* at 661.

46 The *Notice* stated that a contractual interest is created when a nonbroadcast home shopping programmer has its presentation carried by a local cable company and pays the cable operator a percentage of those sales that originate from certain addresses or zip codes. Under such an agreement, the cable operator has a direct financial stake in the success of the nonbroadcast home shopping programmer, and vertical integration is created by contract. *Id.*

47 We also asked commenters whether we should distinguish between ownership and contractual relationships in our analysis. *Id.* Miller is the only commenter to address this question, asserting that we should not make such a distinction. Miller Comments at 17-18. We see no compelling or apparent reason to make such a distinction, and we will not do so in our consideration of this issue.

48 Rozman and Taylor Comments at 5-6; Miracle Rock Church (Miracle Rock) Comments at 5-6; Association of Independent Television Stations, Inc. (INTV) Comments at 8. In addition, several commenters assert that they have had difficulty obtaining carriage, but make no factual assertion that this is directly attributable to their home shopping format. Pan Pacific Comments at 16; Adell Broadcasting Corporation (Adell) Comments at 4; KX Comments at 5-6; Ponce-Nicasio Comments at 1, 10; and Miller Comments at 2.

49 NCTA Comments at 9.

50 *Id.* at 11.

51 Continental Comments at 3.

est in QVC Network, Inc. (QVC), a home shopping cable program provider, its carriage of QVC and HSN is similar.[52] Continental also alleges that cable operators receive commissions from sales in their franchise area not only from cable programming provided by HSN, but also from broadcast sales by HSN.[53] Finally, Continental contends that it provided substantial distribution to the former J.C. Penny Home Shopping Service, in which it had no ownership interest.[54]

18. We initially note one of the findings upon which Congress expressly based the 1992 Cable Act: that vertically integrated cable systems have an incentive and ability to favor their affiliated programmers.[55] However, based on the comments submitted in this proceeding, we cannot determine whether cable operators with either ownership or contractual interests in nonbroadcast providers of home shopping programming have discriminated against home shopping broadcast stations. None of the commenters addressing this issue has submitted any specific information to support its conclusions. On the other hand, with regard to Continental's assertion that its carriage of QVC and HSN is similar, it does not distinguish between HSN's cable and broadcast programming, failing to state whether and under what conditions it carries HSN's broadcast programming. Moreover, Continental reports that it has "a potential ownership interest" in HSN through stock options,[56] making its carriage of HSN programming irrelevant to the question of whether cable systems discriminate against home shopping broadcast programming in which they have no ownership or contractual interest. We believe that these factors diminish the value of Continental's assertions in helping us determine how cable operators interact with broadcast home shopping stations in which they have no ownership or contractual interest. Accordingly, keeping in mind the basic Congressional finding, we will look elsewhere in order to analyze the role of home shopping stations in providing competition to nonbroadcast services offering similar programming.

19. In this regard, HSN and Silver King claim that home shopping broadcast stations provide the principal competition to cable home shopping providers.[57] They allege that denial of carriage to broadcast home shopping stations would limit viewers to services offered only on cable.[58] However, CSC asserts that any benefit from competition between cable and broadcast home shopping services is undermined by growing common ownership of QVC and HSN.[59] NCTA claims that mandatory carriage would destroy competition in home shopping programming, because only broadcast stations would be ensured carriage on the basic tier, while their competitors would have to vie for carriage in the marketplace of a proportionately diminished number of available cable channels.[60]

20. Continental, asserting that HSN's cable and broadcast programming have essentially the same products and format, contends that competition has not produced materially different programming services. Therefore, according to Continental, requiring carriage of both a nonbroadcast and a broadcast home shopping channel could diminish the much greater program diversity that it claims exists between other services.[61] In addition, Continental suggests that a cable operator that carries HSN's cable channel should not be required to carry an HSN-affiliated broadcast station that is largely duplicative of the cable version.[62] Moreover, Continental claims that must-carry of home shopping broadcast stations would result in HSN's having an unfair market advantage over QVC and any new market players, because it would enjoy carriage of both its broadcast (through must-carry) and its cable (through negotiated agreements) programming services.[63] At the same time, Continental also contends that granting must-carry status to home shopping stations would encourage new entrants into the market, by forcing home shopping programmers either to purchase or affiliate with broadcast stations in order to have guaranteed access to a cable channel; Continental claims that the Commission would be replacing the marketplace in determining the level of home shopping programming.[64]

21. Valuevision further addresses the effect of our public interest determination on new market entrants. Claiming that the television home shopping industry is highly concentrated and vertically integrated, Valuevision asserts that must-carry is essential to the ability of new home shopping program providers to obtain and maintain access to cable subscribers, who compose the majority of television viewers.[65] Valuevision adds that without carriage, many such small program providers have failed.[66]

22. We reject the claims of some commenters that grant of must-carry status would create an unfair competitive advantage for broadcast home shopping stations in general, and for HSN in particular. Proponents of that view seem mistakenly to assume that HSN, for example, could enjoy two channels on a cable system, one broadcast and the

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[52] *Id.*

[53] *Id.*, n.3.

[54] *Id.* at 3.

[55] Section 2(a)(5) of the 1992 Cable Act. Congress has also expressed its concern with other discriminatory practices by cable operators, and the Commission has established rules and enforcement procedures to address these concerns. For example, Section 19 of the 1992 Cable Act prohibits unfair or discriminatory practices by vertically integrated programming vendors in selling satellite cable and satellite broadcast programming to certain multichannel video programming distributors. *See First Report and Order* in MM Docket No. 92-265 (*Program Access*), 8 FCC Rcd 3359 (1993). In addition, Section 12 of the 1992 Cable Act prohibits cable systems or other multichannel video distributors from pursuing coercive and discriminatory carriage agreements with programming vendors. *See Notice of Proposed Rulemaking* in MM Docket No. 92-265, 8 FCC Rcd 194 (1992).

[56] Continental Comments at 3, n.3.

[57] Silver King Comments at 52; HSN Comments at 40-41.

[58] They further state that denial of carriage would also deny cable subscribers access to the local public service programming of broadcast home shopping stations. *Id.*

[59] CSC Comments at 17-18. In this regard, Valuevision International, Inc. (Valuevision) provides detailed information concerning the extent of common ownership of QVC and HSN. Valuevision Reply at 9-10.

[60] NCTA Comments at 9-10.

[61] Continental Comments at 4. Continental specifically cites such cable channels as Court TV, the Discovery Channel, Black Entertainment Television, and the Learning Channel.

[62] *Id.* at 5, n.4.

[63] *Id.* at 4-5.

[64] *Id.*

[65] Valuevision Reply at 7-11.

[66] *Id.* at 7. Valuevision cites Tel-Shop, The Fashion Channel, The Value Club of America, and America's Shopping Channel.

other nonbroadcast. However, cable operators are not required to carry specific cable home shopping program providers (such as HSN, QVC, or any combination of these cable services). Further, Continental's suggestion that a cable system already carrying HSN's cable programming not be required to carry a home shopping broadcast station ignores the fundamental purpose of Congress's must-carry scheme: preservation of local television service and the local public interest programming provided by these broadcast stations.[67] Moreover, the must-carry system reflects a balance between that purpose and the contractual carriage agreements between cable operators and programmers.[68] Finally, we note that Congress expressly based the 1992 Cable Act on a finding that vertically integrated cable systems have an incentive and ability to favor their affiliated programmers.[69] We find no evidence in the record that Congress's general finding is not applicable to the specific environment of home shopping programming. Moreover, we seek under this criterion to enhance the menu of competitive choices available to viewers who desire the advantages of home shopping. In this regard, we believe the public would not be served by diminishing the competition to cable home shopping services. Accordingly, we conclude that the existence and carriage of home shopping broadcast stations play a role in providing competition for nonbroadcast services supplying similar programming.

23. In summary, we find that each of the three factors which Congress directed us to consider in our analysis leads us to conclude that home shopping stations are serving the public interest. We shall now turn to other matters that may also affect our determination.

Other Public Interest Factors

24. The *Notice* requested comment on other matters, besides the three factors specifically enumerated by Congress, that we could examine in deciding whether home shopping stations serve the public interest. We invited commenters to address in particular whether the assumptions underlying the deregulation of the commercial guidelines are still valid,[70] and whether home shopping stations provide a needed or valuable service for people who either lack the time or the ability to obtain goods outside the home or who otherwise benefit from the type of marketing process involved.[71] Commenters were also invited to submit information regarding how home shopping broadcast stations have been meeting their public interest obligations.[72]

25. *Assumptions of Deregulation.* In eliminating restrictions on the amount of commercial programming a station could broadcast, the Commission assumed that viewer preferences and market forces would govern commercial loads and that stations would not survive economically if viewers were dissatisfied with the level of commercialization.[73] The Commission also expressed its preference for direct viewer control over content through the reflection of their preferences in the market rather than governmental regulation of programming content.[74] Several commenters addressed whether these assumptions are still valid in today's video marketplace.[75]

26. CSC, for example, notes that the Commission premised the deregulation of commercial time on the assumption that market forces would protect the public from excessive commercialization.[76] However, according to CSC, use of a home shopping format allows licensees to "evade" market forces, thereby demonstrating that the market has failed.[77] CSC also argues that the 1992 Cable Act and its legislative history demonstrate Congress's belief that the market has failed to control commercial levels, thereby prompting this proceeding.[78] Further, CSC claims that Congress's recent institution of commercial limits during children's programming[79] demonstrates the failure of market forces to prevent excessive commercialization during such programming.[80] NAB, on the other hand, cites the commercial success of HSN and argues that market forces have succeeded in reflecting viewer preferences, as the Commission predicted in *Television Deregulation*.[81] NIMA asserts that new forms of video advertising, including program length commercials, are made possible only by consumer interest, and that they are a product of the commercial flexibility that the Commission believed would develop in response to the deregulation of commercial time.[82]

27. There is no evidence that the marketplace has failed to serve television viewers with its evolution to the present number and variety of home shopping services. CSC's claim that the use of a home shopping format allows broadcasters to "evade" market forces is not supported by any data. Indeed, the record clearly demonstrates that market forces have revealed a desire among a significant num-

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[67] Sections 2(a)(9)-(11) of the 1992 Cable Act.

[68] *Broadcast Signal Carriage Issues* at 2988.

[69] *See* ¶ 18, above.

[70] We emphasize that this discussion is limited to the assumptions behind the deregulation of the commercial time requirements and has no bearing on any other action taken in the *Television Deregulation* proceeding.

[71] *Notice* at 661.

[72] *Id.*

[73] *Television Deregulation* at 1101-05.

[74] *Id.*

[75] HSN and Silver King assert that home shopping is the type of format that the Commission had in mind in 1984 when it deregulated commercial time. HSN Comments at 27; Silver King Comments at 13 (citing *Television Deregulation* at 1087-88, 1103). CSC cites prior Commission policies toward commercialization before 1984. RIOR CSC Comments at 5-8. However, Congress has directed us to make our public interest determination notwithstanding prior proceedings. Therefore, we cannot rely on the conclusions that the Commission reached either before or in *Television Deregulation*. Nevertheless, we can seek to determine whether the assumptions upon which the Commission based the deregulation of commercial time are still valid.

[76] CSC Comments at 8, citing *Television Deregulation* at 1105.

[77] CSC Comments at 9.

[78] *Id.* at 9-10; CSC Reply at 8-9, citing 138 Cong. Rec. E2908 (Statement of Rep. Eckart, asserting that the 1992 Cable Act requires the Commission "to conduct a *de novo* review of the overall regulatory treatment of [home shopping stations], notwithstanding prior proceedings the FCC has conducted which may have permitted or had the effect of encouraging such stations' practices").

[79] *See* The Children's Television Act of 1990, 47 U.S.C. Sections 303(a), 303(b), and 394.

[80] CSC Comments at 9.

[81] NAB Comments at 7, citing *Television Deregulation* at 1104.

[82] NIMA Comments at 5-7, citing *Television Deregulation* at 1105.

ber of television viewers for home shopping programming. We find no reason to believe that home shopping stations would survive in an increasingly competitive video marketplace if viewers were dissatisfied with their level of commercialization. We also disagree with CSC's interpretation of the 1992 Cable Act and its legislative history. We note that the passages cited by CSC expressly state that the Commission would undertake a *de novo* review of the overall regulatory treatment of home shopping stations, which includes commercial time limits. They do not express a finding that the marketplace had failed to control the level of commercialization. Had Congress found that the market had failed, we believe that it would specifically have so stated.

28. *Services Provided by Home Shopping Stations.* We also asked in the *Notice* whether home shopping stations provide a needed or valuable service for people who either lack the time or the ability to obtain goods outside the home or who otherwise benefit from the type of marketing process involved.[83] No commenter disputes that home shopping stations meet such specialized needs. Several commenters[84] state that they provide valuable services to the disabled and others confined to their homes, the elderly, families without time to shop by other means, people without ready access to retail outlets or whose outlets do not stock the goods they want, people without cars or other transportation, people who dislike shopping, and people who are afraid of violent crime in conventional shopping areas. Accordingly, based on the record before us, we find that home shopping stations provide an important service to viewers who either have difficulty obtaining or do not otherwise wish to purchase goods in a more traditional manner.

29. *Public Interest Obligations.* Commenters were also invited to demonstrate how home shopping stations have satisfied their obligation to address the needs and interests of their communities of license. In response, we have received detailed listings of the public interest programming of many licensees of home shopping stations.[85] According to these submissions, licensees of home shopping stations have addressed such issues as drug and alcohol abuse, AIDS, race relations, homelessness, basic legal knowledge for non-English-speaking viewers, and local political debates and election returns. These commenters assert that home shopping stations utilize a variety of formats for this type of programming, including public service announcements (PSAs) and program length features.[86] Silver King states that its principal public interest program is *In Your Interest* (*IYI*), a 4.5 minute locally produced program that generally airs once each hour.[87] According to Silver King, it covers some issues in single parts and others in multiple segments. Silver King also asserts that *IYI* 's format consists of interviews with community leaders and experts, discussions, demonstrations, and person-on-the-street interviews designed to elicit local opinions. Silver King further asserts that the Commission has recognized *IYI* as a *bona fide* news interview program that qualifies for an exemption under Section 315(a) of the Communications Act of 1934.[88] Finally, according to Silver King, each of its stations airs four hours each Sunday of non- *IYI* nonentertainment programming, which has included Persian War updates, live local election coverage, weekly reports from a local Member of Congress, and programs on Persian and Islamic culture.[89]

30. In addition, Silver King contends that its stations meet or exceed the former levels of public interest programming that required full Commission review of renewal under previous Commission policies. Specifically, in determining whether the public interest would be served by renewing the license of a commercial television station, the Commission reserved to itself the review of each station's program performance where, during a composite week, less than 5% of the station's broadcast time had been devoted to local programming, 5% to news and public affairs, and 10% to total nonentertainment programming. Silver King states that its stations average 7.6% local programming, 7.6% news and public affairs programming, and 10.2% total nonentertainment programming weekly. Finally, several commenters submit evidence that their stations' proportion of local and public interest programming meets or exceeds that of most independent UHF television stations in their respective markets.[90]

31. Based upon the record before us, it appears that the chosen format of home shopping stations generally does not preclude them from adequately addressing the needs and interests of their communities of license. We observe that we have never denied the license renewal application of any home shopping station, thus indicating that these stations have been able to meet the Commission's standards on public affairs programming responsive to issues confronting the local community, as well as standards on indecency and political or emergency broadcasting. Indeed, with regard to serving the needs and interests of children, as with all public interest considerations, home shopping stations must comply with the same rules that apply to other television broadcast stations.[91] Accordingly, having reviewed the variety of ways in which home shopping stations meet their public interest obligations, we now turn to an issue not expressly mentioned in our *Notice*, but raised by several commenters.

32. *Effect on Minority Ownership of Television Stations.* Several commenters assert that a determination that home shopping stations are not serving the public interest would have a devastating effect on the minority ownership of

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[83] *Notice* at 661.

[84] HSN Comments at 33-34; Long Family Partnership (Long) Comments at 5-6; Adell Comments at 3; Miracle Rock Comments at 4 (Miracle Rock is the proposed assignee of a station already affiliated with HSN); DMA Comments at 6; Silver King Comments at 45; and Ponce-Nicasio Comments at 12.

[85] Among the commenters submitting such information were TV-49, Video Mall, Jovon, Channel 63, Inc. (Channel 63), Roberts, Reading Broadcasting, Inc. (Reading), Pan Pacific, Long, Silver King, KX, Miller, Blackstar Communications of Florida, Inc. (Blackstar Florida), Blackstar Communications of Michigan, Inc. (Blackstar Michigan), and Blackstar Communications of Oregon, Inc. (Blackstar Oregon).

[86] *See, e.g.*, Silver King Comments at 25-32.

[87] *Id.* at 25-28.

[88] *Silver King Broadcasting Company*, 3 FCC Rcd 2819 (1988).

[89] *Id.* at 28-30.

[90] Channel 63 Comments, Exhibit E; Silver King Comments at 24, Exhibit 4; Jovon Comments, Section II.

[91] *See Memorandum Opinion and Order* in MM Docket Nos. 90-570 and 83-670, 6 FCC Rcd 5093, 5096 (1991), *recon. denied*, 7 FCC Rcd 3197 (1992) (*Policies and Rules Concerning Children's Programming*).

television broadcast stations.[92] NABOB asserts that only 20 commercial television stations, seven of which carry a significant amount of home shopping programming, are owned by African Americans.[93] According to Silver King, HSN is also affiliated with two of the seven Asian-owned stations and one of the seven Hispanic-owned stations.[94] Silver King and HSN state that the latter is affiliated with 30% of all the nation's minority-owned television stations.[95] Since 1986, according to HSN, it has funded the acquisition or construction of seven minority-owned stations and has furthered the development of others through affiliation agreements that have been the owners' only source of financing.[96]

33. According to CSC, because home shopping stations often devote 90% or more of their broadcast day to sales presentations provided by an often distant, non-minority-owned programmer, the licensees have little actual opportunity to influence the stations' programming.[97] The Commission's minority ownership policies are intended to enhance the diversity of views and information available to the public, CSC argues, and this goal is not achieved by home shopping stations.[98]

34. In this regard, however, we note Jovon's assertion that 49% of its broadcast day is nonentertainment programming and Pan Pacific's assertion that it devotes only 25% of its prime-time programming to home shopping.[99] In addition, Miracle Rock asserts that the station that it seeks to purchase airs non-HSN programming for more than 50% of its broadcast day.[100] Moreover, even if a minority-controlled station devotes 90% of its broadcast day to HSN's programming, as claimed by CSC, the licensee still retains both the opportunity and the responsibility to control the station's programming generally, and its public interest programming specifically. We thus conclude that minority-controlled licensees of home shopping stations enhance the diversity of views and information available to the public.

35. As we have found earlier, it appears that home shopping stations, including those that are minority-owned, have generally been meeting their programming obligations. Moreover, several minority-controlled and other small and marginal station licensees have stated that their stations currently operate only because of their affiliation with HSN.[101] We also note the express assertions of several minority-owned licensees that the income from their affiliation with HSN allows them to finance public interest programming that they otherwise would not be able to provide.[102] For example, Pan Pacific states that it broadcasts Chinese language news and other public interest programming approximately 1.5 hours each night during prime time.[103] Given the number of minority-owned television stations that are affiliated with HSN, we find that requiring home shopping stations to substantially modify their format would have a destabilizing impact on the minority ownership of television stations. Likewise, we believe the record demonstrates that the home shopping affiliation is important to the efforts of a number of small and marginal stations to continue to operate and serve the public interest.[104]

36. Accordingly, based on a wide variety of factors, we conclude that home shopping stations are serving the public interest, convenience, and necessity. We thus find no need to require such stations to modify their program formats in order to retain or obtain renewal of their licenses. We also reject CSC's suggestion that such stations, due to the level of their commercial programming, should receive no renewal expectancy. Section 4(g)(2) of the 1992 Cable Act directs the Commission not to use home shopping stations' format as a basis to deny them a renewal expectancy, even if their commercial programming is found not to serve the public interest. Moreover, independent of whether we have the authority to deny a renewal expectancy to home shopping stations, the record reflects no detriment to the public caused by their existing program operations.

PROCESS FOLLOWING PUBLIC INTEREST DECISION

Mandatory Carriage of Home Shopping Stations

37. Given our conclusion that home shopping stations are operating in the public interest, Section 4(g)(2) of the 1992 Cable Act seems to suggest that such stations are automatically eligible for mandatory cable carriage. However, the *Notice* stated that another option might be to find that home shopping stations, although operating in the public interest in such a manner as to warrant continued authorization and renewal, do not warrant mandatory cable carriage.[105] Noting that the language of the Act appears to preclude such a conclusion, we asked commenters to address whether the 1992 Cable Act permits the latter approach and, if so, what criteria we might use to distinguish those home shopping stations entitled to carriage.[106]

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[92] *See, e.g.*, NAB Comments at 9.

[93] NABOB Comments at 1.

[94] Silver King Comments at 38, n.54, citing National Telecommunications and Information Administration, "A Statistical Analysis of Minority-Owned Commercial Broadcast Stations Licensed in the United States in 1992" (November 20, 1992).

[95] Silver King Comments at 38; HSN Comments at 16.

[96] HSN Comments at 17-20. *See also* ¶ 10. Among the minority-owned licensees are Jovon, Roberts, Ponce-Nicasio, Pan Pacific, Blackstar Florida, Blackstar Michigan, Blackstar Oregon, and TV-49.

[97] CSC Reply at 10-13. CSC contends that HSN's affiliation agreements improperly delegate programming authority and *de facto* control of the stations to HSN. CSC therefore urges the Commission to nullify all contractual provisions which condition financing of the station on strict adherence to HSN's program schedule. We believe that such an action is not appropriate for this proceeding. If CSC believes that HSN is in *de facto* control of one or several stations in violation of the Commission's rules, it is free to demonstrate such control in a more appropriate, adjudicative proceeding.

[98] CSC Reply at 10-13.

[99] Jovon Comments at 5; Pan Pacific Comments at ii.

[100] Miracle Rock Comments at 2.

[101] See n.30, above.

[102] Blackstar Florida Comments at 1; Blackstar Oregon Comments at 1; Pan Pacific Comments at 3.

[103] Pan Pacific Comments at 10.

[104] See n.30, above.

[105] *Notice* at 662.

[106] *Id.*

38. Several commenters assert that the Act does not allow the Commission to authorize the continued operation of home shopping stations without making them eligible for mandatory carriage.[107] Smolla claims that the must-carry rules have been upheld only because they are content-neutral, and that the must-carry system would be jeopardized by not granting eligibility to home shopping stations.[108] Opposing mandatory carriage in general, Time Warner Entertainment Company, L. P. (Time Warner) asserts that broadcast and nonbroadcast home shopping programming are similar, and that cable operators should have the discretion to determine which would best meet the needs of its subscribers.[109] Time Warner and NCTA argue that home shopping stations do not carry the quality public interest programming that Congress crafted the must-carry rules to protect.[110] Thus, according to NCTA, mandatory carriage of home shopping stations would displace cable channel space that could otherwise carry more substantive news programming, such as CNN or C-Span.[111]

39. We are not persuaded that the 1992 Cable Act would allow the continued authorization of home shopping stations without granting them eligibility for mandatory carriage. The plain language of Section 4(g)(2) provides that the Commission "shall" qualify such stations for mandatory carriage upon a finding that they are serving the public interest. We have made such a finding. Commenters opposing this interpretation have failed to provide a reasonable means to read the statute otherwise. Moreover, we agree with Smolla that the failure to qualify certain licensed stations based upon their programming decisions would place the content-neutrality of the must-carry rules into serious doubt, thereby jeopardizing their constitutionality.[112] We conclude that as long as a home shopping broadcast station remains authorized to hold a Commission license, it should be qualified for mandatory carriage.[113]

Coordination with the Must-Carry Rules

40. We address now how to coordinate the activation of home shopping stations' must-carry rights with the rules adopted in the general mandatory carriage and retransmission consent proceeding.[114] Cable systems were required to begin carrying their full complement of must-carry broadcast stations by June 2, 1993,[115] and broadcast stations were required to make their initial must-carry/retransmission consent elections by June 17, 1993.[116] Silver King states that home shopping stations will be excluded from the pool of local broadcast stations for the purpose of mandatory carriage for at least six months, because: (1) the note to Section 76.58(a) of the Commission's rules prohibits cable systems from deleting or repositioning local commercial television stations during a major ratings ascertainment period (such as will occur in July, 1993); (2) Section 76.58(a) of the Commission's rules directs cable system operators to provide 30 days' notice to a broadcast station before deleting or repositioning that station; and (3) retransmission consent agreements should be completed by mid-August, which will further finalize channel carriage and positioning.[117] Accordingly, Silver King requests a blanket waiver of the 30-day notice requirement, thereby permitting cable systems to add home shopping stations that elect must-carry status immediately upon receipt of their must-carry elections.[118]

41. We deny the waiver request. A party seeking waiver of the Commission's rules bears the substantial burden of demonstrating that the public interest will be served by grant of the waiver request.[119] In the case before us, Silver King has failed to demonstrate that it would be unfairly harmed by application of the notice requirement. Specifically, Silver King has not shown that a significant number of cable systems carry enough broadcast stations on a must-carry basis to allow them to reject carriage of home shopping stations. It also has the burden of demonstrating that the public interest reasons supporting the notice requirement will not be harmed by grant of the waiver request. Silver King has made no such showing.

42. We must now establish the schedule for implementing the carriage of home shopping stations, an issue not otherwise addressed in detail by the commenters. Pending our determination in this proceeding, cable systems were not required to carry home shopping stations, as defined by our interim rule.[120] We have concluded here, however, that home shopping stations are to be treated similarly to other stations for purposes of cable carriage. Thus, these stations are, in terms of cable carriage rights, effectively equivalent to newly operating television stations. Accordingly, we shall commence the process of implementing these stations mandatory carriage, channel position, and retransmission consent rights on the same general schedule established in Section 76.64(f)(4) for new stations making their initial election. Home shopping stations must make their initial must-carry/retransmission consent elections by 30 days after publication of this *Report and Order* in the *Federal Register*.[121] Those stations that elect mandatory carriage must also notify cable operators of their preferred channel

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[107] NAB Comments at 10-11; INTV Comments at 8; Silver King Comments at 54; Rodney A. Smolla (Smolla) Reply at 1-3.

[108] Smolla Reply at 1-3.

[109] Time Warner Comments at 5. In addition, as discussed in ¶ 20, above, Continental opposes the granting of must-carry status to home shopping stations. In opposing mandatory carriage, NCTA makes some of the same arguments. For the reasons set forth in ¶ 22, above, we reject those arguments.

[110] NCTA Comments at 3-8; Time Warner Comments at 4, 7-8.

[111] NCTA Comments at 3-8.

[112] In upholding the constitutionality of the 1992 Cable Act's must-carry provisions, a three-judge panel from the U.S. District Court for the District of Columbia found that they were content-neutral and thereby subject to a less rigorous First Amendment standard of review. However, the court noted that the restriction of a particular type or character of speech might subject a regulation to strict scrutiny. *Turner Broadcasting System, Inc. v. F.C.C.*, Consolidated Nos. 92-2247, 2292, 2294, 2495, 2558, Memorandum Order (D.D.C., April 8, 1993) slip op. at 18.

[113] *See* Section 2(a)(11) of the 1992 Cable Act.

[114] *Broadcast Signal Carriage Issues.*

[115] *Id.* at 2972-73.

[116] *Id.* at 3002.

[117] Silver King Reply at 5-6.

[118] For the same reasons, Silver King also requested that the Commission adopt a *Report and Order* in this proceeding before June 2, 1992. That request is now moot. However, we note that in assigning different schedules in the 1992 Cable Act to the home shopping and general must-carry proceedings, Congress contemplated that this proceeding might not be completed at the time desired by Silver King.

[119] *WAIT Radio v. F.C.C.*, 418 F.2d 1153 (D.C. Cir. 1969).

[120] 47 C.F.R. Sec. 76.56(b)(6).

[121] This applies only to those stations tentatively defined as

positions by the same date. The initial channel position and mandatory carriage obligations for stations not currently carried and that do select mandatory carriage by 30 days after publication of this *Report and Order* in the *Federal Register* will take effect on October 6, 1993, in order that these carriage obligations may be coordinated with the other obligations that take effect on that date. Stations eligible for mandatory carriage that are already being carried will become subject to the mandatory carriage requirement (subject to the channel capacity and other limits set forth in the rules) upon publication of this *Report and Order* in the *Federal Register*.

CONCLUSION

43. Based on the information submitted in this proceeding, we find that broadcast stations that are predominantly utilized for the transmission of sales presentations or program length commercials serve the public interest. Further, we qualify such stations as local commercial television stations for the purposes of cable carriage upon adoption of this *Report and Order*.[122]

ADMINISTRATIVE MATTERS

A. Regulatory Flexibility Analysis

44. The Commission's final regulatory flexibility analysis for this *Report and Order* is set forth in Appendix B.

B. Ordering Clauses

45. Accordingly, IT IS ORDERED that the request of Silver King Communications, Inc. for waiver of Section 76.58(a) of the Commission's Rules IS DENIED.

46. IT IS FURTHER ORDERED that, pursuant to the authority contained in Sections 4 and 303 of the Communications act of 1934, as amended, §§ 154 and 303, and Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, Part 76 of the Commission's Rules, 47 C.F.R. Part 76, IS AMENDED as set forth in Appendix C, effective 30 days after publication of this *Report and Order* in the *Federal Register*.

47. IT IS FURTHER ORDERED that, pursuant to the need to avoid disruption to cable subscribers and broadcast television stations during the transition to the new broadcast signal carriage rules and the authority contained in the Administrative Procedure Act, 5 U.S.C. §553(d)(3), home shopping stations that are eligible for mandatory carriage and that are already being carried will become subject to the mandatory carriage requirement upon publication of this *Report and Order* in the *Federal Register*.

48. IT IS FURTHER ORDERED that MM Docket No. 93-8 IS TERMINATED.

C. Additional Information

49. For additional information on this proceeding, contact Paul R. Gordon, Mass Media Bureau, (202) 632-6357.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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home shopping stations in *Broadcast Signal Carriage Issues* at 3003. Stations not meeting that definition were required to make their initial elections on June 17, 1993.

[122] A substantial portion of the comments submitted in this proceeding discuss whether the Commission has the constitutional authority to restrict the operation or carriage of home shopping broadcast stations, pursuant to the lesser First Amendment protection afforded to commercial speech. Because we are enacting no such restriction, we need not address this issue. Nevertheless, we note the Supreme Court's recent admonition that government regulations not "place too much importance on the distinction between commercial and noncommercial speech." *City of Cincinnati v. Discovery Network, Inc.*, No. 91-1200, slip op. at 14 (U.S. March 24, 1993). We also believe that denying mandatory carriage to home shopping stations would bear no relationship to the goals of the must-carry rules, i.e., the preservation of local television service and the local public interest programming provided by broadcast stations, thereby casting serious doubt on the constitutionality of such an action.

APPENDIX A

FORMAL COMMENTS

Adell Broadcasting Corporation
Association of Independent Television Stations, Inc.
Blackstar Communications of Florida, Inc.
Blackstar Communications of Michigan, Inc.
Blackstar Communications of Oregon, Inc.
Center for the Study of Commercialism
Channel 63, Inc.
Continental Cablevision, Inc.
Direct Marketing Association
Home Shopping Network, Inc.
Jovon Broadcasting Company
KX Acquisition LP
The Long Family Partnership
Miller Broadcasting, Inc.
Miracle Rock Church
National Association of Black Owned Broadcasters, Inc.
National Association of Broadcasters
National Cable Television Association
National Infomercial Marketing Association
Pan Pacific Television, Inc.
Ponce - Nicasio Broadcasting, Inc.
Reading Broadcasting, Inc.
Roberts Broadcasting Company
Mike Rozman and Janet Taylor
Silver King Communications, Inc.
Rodney A. Smolla
Time Warner Entertainment Company, L.P.
Video Mall Communications, Inc.

INFORMAL COMMENTS

Hon. Robert E. Andrews, United States House of Representatives
Martha M. Belluschi
Michael J. Caracciolo
James J. Close
Barry Lee Cobbs
Jim Congleton
Cumberland County College
Vivian I. Davis
Brad Foltyn
William A. Gurley
Dorene V. Holloman
Maria J. Kayes
Hon. John F. Kerry, United States Senate
Hon. William Lipinski, United States House of Representatives
Christina M. Long
Maryann Marian
Vivian L. Marshall
Audrey L. McCrimon
Edmund M. Mecklenburg
Lori Mossberg
New Jersey State College Governing Boards Association, Inc.
Nancy J. Nowak
Marilyn A. Perry
Chris Reimann
Frank Sala
Peter M. Sikora
Sonia A. Stockton
Virginia Stovall
Paul L. Sutton
TV-49, Inc.

FORMAL REPLY COMMENTS

Center for the Study of Commercialism
Channel 63, Inc.
Miller Broadcasting, Inc.
Pan Pacific Television, Inc.
Ponce-Nicasio Broadcasting, Inc.
Silver King Communications, Inc.
Rodney A. Smolla
Valuevision International, Inc.

INFORMAL REPLY COMMENTS

Hon. Edolphus Towns, United States House of Representatives

APPENDIX B

Final Regulatory Flexibility Analysis

Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

I. *Need and purpose of this action.* This action is taken implement the provisions of the Cable Television Consumer Protection and Competition Act of 1992 relating to the development of mandatory cable carriage of home shopping stations.

II. *Summary of issues raised by comments in response to the Initial Regulatory Flexibility Analysis.* No comments were received in response to the Initial Regulatory Flexibility Analysis. However, comments received in response to the Notice of Proposed Rulemaking indicate that small, independent television stations that broadcast home shopping programming are concerned about their ability to compete effectively with television stations carried on cable systems.

III. *Significant alternatives considered and rejected.* We considered two other options before adopting the policies and rules set forth in this *Report and Order*. The first option, to terminate the authorization of home shopping stations, would impede the ability of small, independent television stations that broadcast home shopping programming to compete effectively with television stations carried on cable systems. The second option, to continue authorization without eligibility for mandatory cable carriage, would seem to be prohibited by statute. It would also fail to provide cable subscribers with the access to local news and public affairs programming that Congress intended to foster in passing the 1992 Cable Act.

APPENDIX C

Rules

Part 76 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

Part 76 -- CABLE TELEVISION SERVICE Section 76.56 is revised as follows:

§ 76.56 Signal carriage obligations

Section 76.56(b)(6) is removed.

Separate Statement
of
Chairman James H. Quello

In the Matter of Implementation of Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket No. 93-8.

The 1992 Cable Act directed the Commission to determine whether television stations that are "predominantly utilized for the transmission of sales presentations or program length commercials" serve the public interest. This determination is to be based on three factors: the viewing of "home shopping" stations, the competing demands for the spectrum occupied by such stations, and the extent to which they compete with shopping services provided by nonbroadcast services. Based on the record before us, and as described in the *Report and Order*, I concluded that home shopping stations serve the public interest. As a consequence, they now qualify for "must carry" status.

However, apart from the criteria established in the 1992 Cable Act, I am aware of strong sentiment that such stations are inconsistent with the overall public interest mandate of the Communications Act. *See, e.g.*, H. Rep. 102-628 at 103-04 (Additional Views of Messrs. Ritter, Tauzin, Slattery, Kostmayer, Oxley and Fields). For that reason, I believe it would be appropriate for the Commission to initiate a more general reexamination of the issue of commercialism as it relates to the public interest.

A separate proceeding is desirable for a variety of reasons. First, I believe it would comport more with the concerns I have heard expressed about commercialism. Second, I am concerned that a decision in this proceeding to exclude home shopping stations from must carry status solely because of their content would have jeopardized the legal defense of the must carry rules.[1] Finally, the public interest standard assumes that the Commission will continuously evaluate changes in the media environment and in technology that affect its meaning.

The public interest standard of the Communications Act is the basic statutory charter under which broadcasters operate. But while the overall requirement is a constant, its meaning changes over time to account for the evolution of the mass media, consumer needs and audience expectations. The changing nature of this continuing mandate may best be understood by gaining some historical perspective.

A Brief History of the Public Interest Standard

When Congress enacted the Radio Act of 1927, it borrowed the expression "public interest, convenience or necessity" from the field of railroad regulation but did not independently define the term.[2] The Communications Act of 1934, which superseded the Radio Act and created the FCC, continued to leave the term "public interest" undefined.[3]

Congress purposefully left the regulatory standard open, with the details to be filled in by the FCC over time. This had much to do with the fact that radio was a new and complicated technology. The FCC's broad powers were based on the assumption that "Congress could neither foresee nor easily comprehend . . . the highly complex and rapidly expanding nature of communications technology."[4] The Supreme Court affirmed in *FCC v. Pottsville Broadcasting Co.*, that the public interest standard is "as concrete as the complicated factors for judgment in such a field of delegated authority permit," and noted that the approach is "a supple instrument for the exercise of discretion."[5]

The public interest is not just a flexible standard; it is expressly forward-looking. For example, in 1983 Congress added a new section to the Act establishing "the policy of the United States to encourage the provision of new technologies and services to the public."[6] The Supreme Court similarly has recognized that "because the broadcast industry is dynamic in terms of technological change[,] solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence."[7]

Consequently, I believe the Act directs the FCC to gauge the public interest by looking to the future, not the past. It simply is impossible to define the public interest merely by examining what it may have meant in 1929, or even 1969. A quick survey of past decisions underscores this point.

The Commission has revised its substantive public interest requirements over time in response to changing conditions. In 1941, the Commission decided that broadcast editorials violated the public interest, only to reconsider that policy eight years later.[8] Similarly, in 1945 the Commission withheld renewal of a radio station license until the station agreed to sell time for paid editorials to the United Auto Workers.[9] Since then, however, the Commission determined that licensees cannot be forced to sell time to a particular group. This more current view of the public interest was upheld by the Supreme Court.[10]

Even when the basic policies do not change, the Commission has modified their application. This has occurred because our understanding of the public interest undoubtedly has evolved along with society. Audience needs and expectations are not the same today as they were in the early days of radio.

Certainly audience sensibilities have changed. For example, in late 1937, hundreds of radio listeners complained about an episode of NBC's "Charlie McCarthy" program in which Charlie McCarthy and Mae West portrayed the title characters in a sketch entitled "Adam and Eve." The Commission investigated the matter and found nothing in the script objectionable. But some of Mae West's inflections were considered "suggestive." On this basis, the Commission sent NBC and its affiliates letters concluding that the program was "vulgar , immoral or of such other character as may be offensive to the great mass of right-thinking, clean-minded American citizens."[11]

Of course, the Commission continues to actively enforce the indecency rules as part of the basic statutory requirement for broadcasters. I have been, and continue to be, a vocal supporter of the rules' enforcement in appropriate cases. But I think it may be just a bit unrealistic to use the same measure for "offensiveness" in 1993 that the Commission employed over half a century ago. The public interest *requirement* may be the same, but its *application* is quite different as conditions change.

The same is true for some of the Commission's other programming requirements. For example, eight Georgia radio stations were given only temporary renewals in 1958 because the stations were devoted to a "news and music" format. The Commission informed the stations by letter that full-term license renewals had been denied because their program schedules consisted "almost entirely of recorded music."[12] I doubt that the public interest would be served if the Commission imposed this rigid view on the radio industry today.

Similar examples abound. The Commission has suggested in the past that the public interest was not served when stations scheduled commercials within news programs, or when they aired "too many" soap operas.[13] In 1937 the Commission questioned the license renewal of a station that produced a program called "The Friendly Thinker" that offered advice on business affairs, love and marriage. Although the show's host was not an astrologer and disclaimed any supernatural powers, the Commission noted that such advice programs were objectionable because they tended to mislead the public. The Commission renewed the license only after the station discontinued the program.[14] If such a view of the public interest prevailed today, many, if not most, licenses would be at risk.

Our approach to broadcast advertising also has evolved. In 1936, the Commission ordered a renewal hearing for a licensee that had aired commercials that made "exaggerated claims" for a weight loss product.[15] Just imagine the number of minor celebrities that would have to find honest work if the Commission mounted a new crusade to ensure the effectiveness of diets.

On a more basic level, the notion of what may be considered "excessive" advertising has changed over time. In 1930, William S. Hedges, then president of the National Association of Broadcasters, testified before Congress regarding the quantitative advertising limits that the NAB then enforced. He said that at his station, "no more than one minute out of the 30 minutes is devoted to advertising sponsorship. In other words, the radio listener gets 29 minutes of corking good entertainment, and all he has to do is to learn the name of the organization that has brought to him this fine program."[16]

Not only does today's audience expect to give up more than a minute in exchange for a corking good sitcom, the Commission concluded that those viewers are the best judge of how much advertising is too much. The Commission found

in 1984 that the number of alternatives available to viewers is the best protection against over-commercialization. The tyranny of the remote control provides an adequate check on broadcast stations that must increasingly compete for viewers.17

Such an approach was unthinkable to the Federal Radio Commission. In fact, in 1928 it expressly rejected the argument that listeners could shift away from "irksome" broadcasts in a decision placing four stations on probation. The FRC noted that the listeners' "only alternative, which is not to tune in on the station, is not satisfactory, particularly when in a city such as Erie only the local stations can be received during a large part of the year. When a station is [devoted to excessive advertising] the entire listening public is deprived of the use of a station for a service in the public interest."18

It is beyond dispute that the current Commission must consider a very different media environment than did the FRC. The number of television stations increased by 50 percent between 1975 and 1992; more than half of all households receive ten or more over-the-air TV signals; over 90 percent of all households are passed by cable and over 60 percent subscribe; the average cable subscriber receives more than 30 channels; other competitive video providers are increasingly available, and national DBS service is anticipated next year.19 The Commission's recent decision to curtail the financial interest and syndication rules recognizes that broadcast television now faces stiff competition from other media. In just a few years, the broadcast networks have experienced sharp declines in their audience shares, from over 90 percent in the mid-1980s to less than 60 percent today.20

Given these developments, I think that the Commission's interest in preventing over-commercialization is far different today than we may have considered necessary in the past.21 The public is not deprived when a given station chooses a specialized format, such as home shopping, and, as discussed below, may even benefit.

Home Shopping Stations and the Public Interest

I will not repeat the discussion contained in the *Report and Order* regarding the extent to which home shopping stations devote time to traditional public service programs. But quite frankly, I was surprised at the extent to which this is true. In addition to the formal comments submitted for the record, the Commission was flooded with correspondence attesting to the community service provided by these stations.

In the space of a few days, dozens of individuals and organizations from across the country wrote to urge the Commission to decide this proceeding in favor of home shopping stations. They included government officials from all levels, non-profit and charitable organizations, educational and cultural institutions, public safety groups, medical professionals, service organizations, as well as representatives of various constituencies, including women, minorities, the elderly, the disabled, the homeless and children.22 For the most part, these commenters urged us to find that home shopping stations serve the public interest in the same way as broadcasters with more traditional formats — by providing information vital to their communities.

But I think this proceeding implicates a broader public interest question that goes to the heart of the future of broadcasting. We are constantly told of the brave new electronic future in which an array of services will be available on call directly to consumers. They include home shopping, home banking, pay-per-view events and a host of other interactive services.

People probably are not thinking about what has been called the "electronic superhighway" when they joke about Ginsu knives and cubic zirconium jewelry. And while the products being sold at the moment on some channels may attract ridicule in some quarters, it is evident that home shopping services are a precursor to this promising future in which consumers may use their TVs for more than just passive viewing.

In this regard, there may be an important distinction between the issue of "commercialism," raised by some commenters, and that of providing a home shopping *service*. The record in this proceeding reveals that this service seems to be quite popular with the general audience. But the benefits take on added significance for people who are in some way incapacitated.

The Director of the Suffolk County Office of Handicapped Services wrote that home shopping "is both a convenience and a necessity for people with disabilities."[23] Similarly, the volunteer coordinator of an organization that serves the homebound elderly pointed out that the Home Shopping Network "provides [them] a means to shop from their own living room, some 'company', and entertainment for folks who won't or don't get out of their home or see another soul from day to day to day."[24] The director of an extended care facility for the elderly added that a home shopping program "may not mean as much to healthy and mobile people such as you and I, but if you could see [the people confined in this situation], the significance of your decision would certainly be put into perspective." For those who are "not physically able to travel to local shopping centers," these stations literally are "all they have."[25]

Some have suggested that those who want home shopping services should subscribe to cable. As noted by an official in a home health agency, however, local residents "are virtually at the mercy of their cable provider's whim" unless the service is available over-the-air.[26] In any event, it is important to bear in mind that not everyone wants — or can afford — cable TV. And I suspect that this is particularly true for those people who benefit most from the availability of home shopping service.[27]

There are likely to be even more far-reaching implications if the Commission were to find that it disserves the public interest for broadcasters to provide such service. Would it mean that other video technologies should be granted a monopoly on the provision of interactive services to the extent there is some commercial element? What would such a ruling mean for the development of advanced television, particularly if broadcasters could use its digital capabilities for multiple channels? As I always ask, what are the ramifications for the future of free over-the-air television?

Conclusion

Based on the record in this proceeding and the criteria established in the Cable Act, I think that home shopping stations serve the public interest. But the Communications Act presumes that the Commission will reevaluate the general public interest mandate from time to time, and the issues raised in this proceeding suggest that such a review may now be appropriate.

I believe that broadcasters must play an important role in this nation's electronic future. The public interest mandate of the Communications Act requires that we look to that future, rather than to Depression Era policy pronouncements.

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[1] In *Turner Broadcasting System, Inc. v. FCC*, No. 92-2247 (D.D.C., April 8, 1993) Slip op. at 18, the court emphasized that the must carry rules received a lower level of First Amendment scrutiny because they were not content-based. But if the Commission decided to deny must carry status to a class of stations because of their content, it would undermine the court's bedrock assumption supporting the constitutionality of must carry rules.

[2] The Radio Act directed the Federal Radio Commission to perform its various tasks, including classifying radio stations, describing the type of service to be provided, assigning frequencies, making rules to prevent interference, establishing the power and location of transmitters and establishing coverage areas in a way that maximized the public good. Of course, this begged the essential question of what constitutes "the public good." The FRC took the position that the Supreme Court eventually would define the public interest case by case. Nevertheless, it outlined the primary attributes of the public interest in its policy statements and licensing decisions.

[3] *Office of Communication of the United Church of Christ v. FCC*, No. 81-1032, slip op. at 27 (D.C. Cir., May 10, 1983) ("the [Communications] Act provides virtually no specifics as to the nature of those public obligations inherent in the public interest standard"). Despite the lack of a categorical definition of the public interest, various provisions of the Act operationally define at least part of what Congress intended. For example, the Act directs the FCC to provide, to the extent possible, rapid and efficient communication service, adequate facilities at reasonable charges, provision for national defense and safety of lives and property, and a fair, efficient and equitable distribution of radio service to each of the states and communities.

[4] *National Ass'n. of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 638 n.37 (D.C. Cir. 1976).

[5] 309 U.S. 134, 138 (1940).

[6]47 U.S.C. § 157.

[7]*CBS v. Democratic National Committee*, 412 U.S. 94, 102 (1973).

[8]*Compare Mayflower Broadcasting Corp.*, 8 F.C.C. 333 (1941) with *Opinion on Editorializing by Broadcasters*, 13 F.C.C. 1246 (1949). *See also Syracuse Peace Council*, 2 FCC Rcd. 5043 (1987), *aff'd sub nom. Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 717 (1990) (Fairness Doctrine does not serve the public interest); *FCC v. League of Women Voters of California*, 468 U.S. 364, 378 (1984) (ban on editorials by public broadcast stations is unconstitutional).

[9]*E.g., United Broadcasting Co.*, 10 F.C.C. 515 (1945).

[10]*CBS, Inc. v. Democratic National Committee*, 412 U.S. 94, 122 (1973) (broadcasters may not be compelled to provide a generalized right of access to discuss controversial issues).

[11]*See* "FCC Issues Rebuke for Mae West Skit," *Broadcasting*, January 15, 1938 at 13.

[12]*See* "Closed Circuit," *Broadcasting*, March 31, 1958 at 5; "Closed Circuit," *Broadcasting*, July 7, 1958 at 10.

[13]*See generally Public Service Responsibility of Broadcast Licensees* (March 7, 1946) (the "*Blue Book*").

[14]*Radio Broadcasting Corp.*, 4 F.C.C. 125 (1937).

[15]*Don Lee Broadcasting System*, 2 F.C.C. 642 (1936).

[16]Senate Committee on Interstate Commerce, Hearings on S. 6, 71st Cong., 2d Sess. (1930). William S. Paley of CBS similarly testified that seven-tenths of one percent of the network's air time was devoted to advertising. *Id.*

[17]*The Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 98 F.C.C.2d 1076, 1101-05 (1984), *aff'd in relevant part sub nom. Action for Childrens Television v. FCC*, 821 F.2d 741 (D.C. Cir. 1987).

[18]FRC Decision on Stations WRAK, WABF, WBRE and WMBS, discussed in the *Blue Book* at p. 41.

[19]*See Review of the Commission's Regulations Governing Television Broadcasting*, MM Docket No. 91-221, FCC 92-209 (released June 12, 1992).

[20]*Evaluation of the Syndication and Financial Interest Rules*, 58 Fed. Reg. 28927 (May 18, 1993).

[21]It is important to acknowledge that "the 'public interest' standard necessarily invites reference to First Amendment principles." *CBS, Inc. v. Democratic National Committee*, 412 U.S. at 122. Additionally, many of the Commission's prior policies on commercialism predated the extension of First Amendment protection to commercial speech. And most recently, the Supreme Court has cautioned that government regulations should not "place too much importance on the distinction between commercial and noncommercial speech." *City of Cincinnati v. Discovery Network, Inc.*, No. 91-1200, Slip op. at 14 (U.S. March 24, 1993). Any evaluation of the constitutional "worth" of speech that is based on the percentage of editorial content compared to advertising material is a very suspect proposition. Newspapers, which receive full First Amendment protection, generally strive for a ratio of about 70 percent advertising to 30 percent editorial content. *See* C. Fink, *Strategic Newspaper Management* 43 (1988).

[22]I personally received far too many letters to list. However, some of the organizations that provided testimonials as to the public service of home shopping stations included the Miami Rescue Mission, Inc.; the American Association of Retired Persons; Find the Children; Opportunities and Services for Seniors, Inc.; U.S. Department of Housing and Urban Development, Tampa Office; National Oceanic and Atmospheric Administration, U.S. Department of Commerce; The Salvation Army, Salem, Oregon Corps.; Parents Anonymous of Maryland; Sen. James S. Cafiero, New Jersey Senate; Departments of Medicine and Ophthamology, New Jersey Medical School; Concerned Relatives Alliance for the Mentally Ill, Inc.; Sheridan House Family Ministries; YWCA of Salem, Oregon; Superintendent of Schools, San Bernardino County; Oregon Department of Insurance and Finance; South Brevard Women's Center, Inc.; City of Lakeland Department of Police; Hospice Care of Broward County, Inc.; Mayor James Sharpe, Newark, NJ; City of Ontario Fire Department; Cuyahoga Heights Public Schools; All Children's Hospital, St. Petersburg, FL; Long Island Coalition for Fair

Broadcasting, Inc.; Broward Economic Development Council, Inc.; King Center for the Performing Arts, Melbourne, FL; Chemeketa Community College; Resource Center for Women, Largo, FL; Southern California Association of Governments; Chief of Police, Salem, Oregon; Human Development Center, Tampa, FL; Sen. Caesar Trunzo, New York Senate; Crime Prevention Resource Center, Salem, Oregon; The Gilbert House Children's Museum, Inc.; North Santiam Canyon Tourism Coalition; The Epilepsy Foundation of Brevard County; Medical Group Services, Inc.; Department of Solid Waste Management, Marion County, Oregon; Newspaper in Education; Salem Oregon Public Library; YMCA, Salem Oregon; Salem Area Chamber of Commerce; Brevard Cultural Alliance; The Women's Record; Supervisor of Elections, Pinellas County, FL; Junior Achievement of the Suncoast; Humane Society of North Pinellas, Inc.; The First Occupation Center of New Jersey, Inc.; Illinois Department of Rehabilitation Services; Foster Parent Association of Brevard County; Brevard Community College; Children With Attention Deficit Disorders; Holmes Regional Medical Center, Melbourne, FL; United Negro College Fund, Brevard County Campaign; Carl Stokes, Baltimore City Council; DuPage County (Illinois) Health Department; National Safety Council, Pinellas County Chapter, Inc.; Salem Art Association; Youth Shelter Network, Chicago; Inland Empire Small Business Development Center; Director, Ontario (California) International Airport; Melvin L. Stukes, Baltimore City Council; Oregon Economic Development Department; Supervisor, Town of East Hampton (NY); Retirement Resources, Inc.; Boys & Girls Club of Salem; Marion County (Oregon) Board of Commissioners; Marion Polk Food Share, Inc.; Humane Society of the Willamette Valley; Crisis Services of Brevard, Inc.; American Heart Association of Metropolitan Chicago; Retired Senior Volunteer Program; Florida Blood Services; Long Island Women's Coalition, Inc.; Long Island Blood Services; Newark Emergency Services for Families, Inc.; National Marrow Donor Program; Kathy's Cable Kids, Inc. (a drug prevention program); Oregon Donor Program; American Cancer Society, Oregon Division, Inc.; Women's Educational and Industrial Union; Florida Sheriffs Youth Ranches, Inc.; Office of the District Attorney, Riverside (California); Rowan College of New Jersey; State Highway Administration, Maryland Department of Transportation; Greater Baltimore Community Housing Resource Board, Inc.; Cumberland County (NJ) Sheriff's Department; New Jersey Crime Prevention Officers Association; Division of AIDS Education, University of Medicine and Dentistry of New Jersey; City Manager, City of Alvin (Texas); Hudson (Massachusetts) Youth Center; International Society of Athletes; Maryland Department of Juvenile Services; Community Nursing Service of Vineland (NJ), The Centre for Women; Operation PAR (Parental Awareness and Responsibility), Inc.; Pearland (Texas) Police Department; Maryland Department of Public Safety and Correctional Services; Grandparent's Rights Advocacy Movement, Inc.; American Diabetes Association, Inc., Massachusetts Affiliate; Fay School, Southborough (Massachusetts); Long Island Association; Literacy Instruction for Texas; San Bernardino County Medical Society; North Jersey Blood Center; The Council on Compulsive Gambling of New Jersey, Inc.; Office of the Mayor, Tampa (Florida); Parents' and Children's Services, Boston; National Council on Alcoholism and Drug Abuse, St. Louis Area; National Multiple Sclerosis Society; Big Brothers and Big Sisters of Greater St. Louis; Housing Options Provided for the Elderly, Inc.; The Cooper Institute for Aerobics Research; Chicago Christian Industrial League; March of Dimes, Massachusetts Chapter; Consumer Credit Counseling Service of Greater Dallas, Inc.; Maryland Energy Administration; Judge David Carter, Orange County Superior Court; New York Council on Adoptable Children; San Bernardino County District Attorney; Project Sister; Easter Seal Society of Southwest Florida, Inc.; U.S. Department of Veterans Affairs; Associated Public Safety Communications Officers, Inc.; Maryland Department of Natural Resources; American Red Cross, Tampa Bay Suncoast Chapter; National Kidney Foundation of Massachusetts and Rhode Island.

[23]Letter from Bruce G. Blower to James H. Quello (June 30, 1993).

[24]Letter from Cindy Getchell, Bay Path Senior Citizens Services, Inc., to James H. Quello (June 25, 1993).

[25]Letter from G. Neal Varney, CEO, Sudbury Pines Extended Care Facility, to James H. Quello (June 25, 1993) (emphasis in original).

[26]Letter from Barbara Patterson, Visiting Home Health Service, to James H. Quello (June 29, 1993).

[27]I recognize that home shopping stations will appear on cable systems as a result of this decision, and that subscribers therefore pay a basic service fee to receive them. However, the must carry rules presume broadcasters' basic need for carriage, and thereby support the economic health of local service. As a consequence, local service — regardless of format — will continue to be available to those who cannot afford cable television.

SEPARATE STATEMENT
OF
COMMISSIONER ANDREW C. BARRETT

RE: Implementation of the Cable Television Consumer Protection and Competition Act of 1992 -- Home Shopping Stations

This *Report and Order* finds that broadcast stations that are predominantly utilized for the transmission of sales presentations or program length commercials serve the public interest, based on factors enumerated in the 1992 Cable Act, including: (a) evidence of significant public viewership and the lack of quantifiable data demonstrating otherwise; (b) competing demands of other television broadcasters; and (c) competition with nonbroadcast home shopping services. As a result of the public interest finding on these statutory factors, as well as other considerations, such stations will qualify as "local commercial television stations" for the purposes of cable carriage.

I write separately to emphasize that factors other than those explicitly stated in the 1992 Cable Act must be considered in most directly determining the public interest standing of any broadcast station, including home shopping stations. These public interest considerations broadly include a broadcast station's compliance with the Commission's standards on political and emergency broadcasting, children's programming, and indecency standards, as well as the extent of the station's public affairs programming responsive to issues confronting the local community. In this regard, despite the concerns regarding "commercialism" raised in this proceeding, I believe that the record indicates that home shopping stations have met the Commission's general public interest standards, and that the chosen format for home shopping stations does not preclude them from adequately addressing the needs and interests of their communities of license.

As an additional important consideration, I support this *Report and Order* because the record demonstrates a public interest value of home shopping stations due to their role in generating financing for small and marginal stations. To the extent that these home shopping stations have demonstrated an ability to meet the Commission's standards for all broadcasters, I believe that the public interest finding and the resulting must carry status are warranted.

Dissenting Statement
of
Commissioner Ervin S. Duggan

In the Matter of Implementation of Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992: Home Shopping Station Issues

Today, unfortunately, the Commission deliberately and explicitly puts forward a minimalist definition of the public interest standard. It does so at precisely the moment when we should be mending and refurbishing that tattered banner and lifting it high over a broadcast culture that is, to borrow Gerard Manley Hopkins's poignant phrase, "all... seared with trade."

I sympathize with the difficulties my colleagues face, given the implications of this vote for the must-carry provisions of the 1992 Cable Act. I sympathize also with those home shopping licensees who, as minority members, have made this format their entry path into the broadcast industry; I know several of them and admire their entrepreneurial efforts. This question, nevertheless, presents deep questions of principle that, in the end, prevent me from voting with my colleagues. My quarrel is not with home shopping licensees, who after all have been operating under the Commission's rules I since home shopping was introduced nearly a decade ago; it is with a regulatory philosophy that seems no longer to care about quality.

I am not unmindful of the role that these stations play in their communities. Friends and supporters of home shopping stations have inundated the Commission with letters by fax and mail in recent days; a stack of perhaps 1,000 pages of correspondence supporting individual home shopping stations was delivered to my office after I deferred the *Report and Order* from our regular agenda. Their message? That local home shopping stations support blood drives, voter registration campaigns, efforts to locate missing children, environmental clean-up drives and a host of other projects.

I do not for a minute underestimate the value of having home shopping stations involved in these efforts, and no Commissioner would want to silence their voices. Reaching a different outcome in today's proceeding would not silence them. Home shopping is thriving financially, and I have seen nothing in the record proving that home shopping broadcast stations would cease to do well in the future.

The overriding question to me is one of fundamental policy: Do television stations that fill 23 hours a day with satellite-delivered, non-stop sales pitches serve the public interest by salting each hour of commercials with : & four minutes an hour of public service announcements? The answer seems obvious to me: They do not. No matter how well-intentioned and effective their sound bites for blood drives and voter registration campaigns may be, the Commission cannot gainsay that those announcements are tiny islands in a sea of commercial content. Home shopping stations devote substantially all their time, practically every day, to distributing one long, remotely prepared commercial message--- and they use the public's scarce and precious spectrum to do it.

The Commission's decision today says simply: That kind of broadcasting does not offend the public interest. Yet we cannot sidestep the ominous implications of such a statement. If home shopping stations serve the public interest, then this Commission is saying, by extension, that it would be content to have *every* television station in *every* market become a home shopping affiliate. My colleagues may protest that that is an unlikely situation, and one that they would never accept. And surely wall-to-wall home shopping over the public airwaves is a condition that Congress and the public at large would not tolerate. Yet today's action points in that direction. It raises the possibility that other broadcast stations, given the nod by the federal government, will decide to boost their revenues by devoting program time to home shopping. I am unwilling, therefore, to give this decision my approval.

The view being pressed upon us is that a home shopping presentation is not a commercial. In support of that view, we are told that home shopping is simply the sort of broadcast programming that the Commission has long blessed. We are told that it is educational, that home shopping informs consumers about complicated products---what it means to have a certain kind of microprocessor in a home computer or the advantages of polyester over cotton. We are told, moreover, that home shopping is

entertaining: the hosts are celebrities, the products are organized into "program segments" with clear themes, and viewers enjoy it.

In fact, the Supreme Court some time ago was presented with this sort of casuistry and soundly rejected it. Students at the State University of New York attempted to defeat the college's regulation of Tupperware parties on similar grounds. They argued that the Tupperware demonstrations included discussions of how to be financially responsible, and how to run an efficient home. The Court responded skeptically, as I believe the Commission should respond today: "Including these. . . elements no more converted [the Tupperware] presentations into educational speech than opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech." *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 474 (1989).

Finally, and most disturbing to me, we are told that the several minutes an hour that home shopping stations devote to local news, information, and public service messages constitutes more in the way of public service than many "regular" commercial broadcast stations provide in their markets; it is, in fact, more than any television station was required to provide in the good old days of rigorous regulation. I see no reason why the Commission should accept such an argument: It merely proves that the minimally adequate is the enemy of something more. Even worse, this argument fails to deal with the central question of this entire debate: What is the level of service--- not yesterday, but today--- that this Commission, and the American public, ought to expect from a local broadcaster in exchange for free use of the public airwaves?

For me, therefore, the implications of the Commission's home shopping decision are disturbing. The public interest standard, after a decade of deregulatory erosion, cannot withstand much more pounding--- yet this decision sweeps over the public interest beachhead like a tidal wave. Today's action fails to make crucial distinctions about overcommercialization that the Supreme Court entitles us to make and that the statute asks us to make. And so we drastically diminish our own ability, for the long term, to devise a coherent definition of the public interest and to make the judgments that Congress has been pressing us to make: How much commercial content is too much? If an anything-goes approach to program-length commercials works for the average viewer, then how can the Commission (and Congress) defend the restrictions on program-length commercials directed at all but the youngest children? When are broadcast stations providing so little worthwhile programming to their communities that their licenses are in jeopardy? These questions will stay with us--- but answering them in the future will be much more difficult in light of today's decision.

I want to emphasize that, as a legal matter, I view the obligation that Congress has assigned to the Commission quite narrowly. Under Section 4(g) of the 1992 Cable Act, Congress directed the Commission to take a fresh look at the public-interest aspects of home shopping stations occupying broadcast spectrum. Any ambiguity about the scope of our task under Section 4(g) was removed on the House floor in a colloquy between Congressman Dennis Eckart and Congressman John Dingell.[1] The public interest examination that we are required to make under the Act is self-contained. It stands entirely apart from judgments about these stations' must-carry rights.

I believe that the Commission, in the context of Section 4(g), could have reasonably concluded that home shopping stations ought to provide some level of service beyond 23 hours of commercial programming per day. And I believe that such a finding would not contaminate the current litigation about must-carry rights of commercial stations generally. My colleague Chairman Quello has fought the must-carry battle valiantly throughout his career at the Commission; I know that he cares deeply about it, and I share his concern that we not damage must-carry's ultimate defense. Nonetheless, I believe we could have reached a different outcome in this proceeding without harming the overall must-carry scheme. I regret that we have not done so.

I have one final regret. When the Commission launched this proceeding months ago, I warned from the bench that our actions here could create a two-tier system of commercial broadcasting. The first tier would be stations that clearly operate in the public interest. The second tier would consist of stations, perhaps like many of these home shopping affiliates, who could not be said to be serving the public interest for purposes of the Cable Act, but who nevertheless did not deserve the death penalty of losing their licenses. I saw danger in such an outcome then, and because this dissent pushes me toward that position, I am not entirely comfortable with it. Ultimately, however, if the Commission ever revisits this question, perhaps it should more closely examine whether creating such a regime might better accomplish what Congress intended.

In 1929, the old Radio Commission, predecessor of today's FCC, set forth its definition of the public interest standard in words that required broadcasters to present diverse programming including "entertainment, music of both classical and lighter grades, religion, education and instruction, important public events, discussions of public questions, weather, market reports and... news." Are Congress and the Commission ready now to abandon this ideal? I hope not, and I cast my dissent in the hope that some day Congress and the Commission will find it possible to visit this question again.

Until we do, I will think of the public interest standard as a sort of once-handsome thoroughbred, so abused and neglected that it has finally broken down in the middle of the track. Perhaps we can take it back to the paddock in the hope that, with care and love, it can recover--- or at least produce offspring that recall the beauty of the original. If not, let us simply put the poor beast out of its misery once and for all.

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[1] Mr. Eckart: "First, let me ask my colleague if I am correct that the proceeding mandated under Section 614(g)(2) of the bill reported by the conference requires the Federal Communications Commission to conduct a *de novo* review of the overall regulatory treatment of stations that are predominantly used for sales presentations or program-length commercials, notwithstanding prior proceedings the FCC has conducted which may have permitted or had the effect of encouraging such stations' practices." 138 Cong. Rec. E2908 (October 2, 1992) (Statement of Mr. Eckart). Mr. Dingell answered in the affirmative. *Id.* (Statement of Mr. Dingell).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

FOX TELEVISION STATIONS INC.

Licensee of Television Station
WNYW, New York, New York

Request for waiver of the
Broadcast-Newspaper Cross-Ownership
Rule Relating to WNYW and
the *New York Post*

DECLARATORY RULING

Adopted: June 29, 1993; **Released: July 9, 1993**

By the Commission: Chairman Quello issuing a separate statement; Commissioner Barrett dissenting and issuing a separate statement; Commissioner Duggan issuing a separate statement.

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INTRODUCTION

1. The Commission has before it for consideration a request from Fox Television Stations Inc. (Fox) for permanent waiver of the broadcast-newspaper cross-ownership rule, Section 73.3555(d)(3) of the Commission's Rules, which generally proscribes common ownership of a broadcast station and a daily newspaper in the same market. Fox seeks a waiver so that it may continue to hold the license for television station WNYW, Channel 5, New York, New York, following the acquisition of the *New York Post* by NYP Acquisition Corp. (NYP). Both Fox and NYP, subsidiaries of The News Corporation Limited (News Corp.), are controlled by K. Rupert Murdoch. Comments, reply comments, and responses, as well as dozens of letters, were submitted both in opposition to, and in support of, Fox's request.[1]

2. Of the ten parties submitting formal comments or reply comments, seven, Caucus for Media Diversity (Caucus), Champion Holding Company (Champion), Fleischman & Walsh (Fleischman), Drs. Lenora Fulani, Rafael Mendez, Fred Newman and the *National Alliance* (Fulani), Metropolitan Council of National Association for the Advancement of Colored People Branches and the *New York Amsterdam News* (NAACP), National Association of Black Owned Broadcasters (NABOB), National Black Media Coalition and the Committee to Eliminate Media Offensive to African People (NBMC), oppose Commission grant of waiver to Fox, and two, the Official Committee of Unsecured Creditors of the *New York Post* (Creditors) and WLIG-TV, Inc. (WLIG), support such a grant. Media Access Project and Washington Area Citizens Coalition Interested in Viewers' Constitutional Rights (MAP), while taking no position on Fox's request, urge that in the event a waiver is granted, the Commission narrowly tailor that decision.

BACKGROUND

3. Upon Fox's acquisition in 1986 of WNYW, New York, New York, Murdoch, as principal of Fox,[2] was granted a two-year period in which to divest his direct or indirect interests in the *New York Post*, which he had purchased in 1976. *Metromedia Radio & Television, Inc.*, 102 F.C.C. 2d 1334 (1985).[3] He did so in March 1988, assigning ownership of the newspaper to real estate developer Peter S. Kalikow, the current owner. Following acquisition of the newspaper, Kalikow states, he was able to sustain the *Post*'s operations through his real estate holdings, but upon declaring personal bankruptcy in August 1991, "it became evident" that his real estate company could no longer function as the newspaper's source of capital.

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[1] Interested parties were given the opportunity to comment on Fox's waiver request, with an initial deadline of April 26, 1993. *Public Notice*, DA 93-432, released April 12, 1993. That comment deadline was extended to May 10, 1993 by *Order*, DA 93-458, released April 16, 1993, based upon our request to Fox for further information and an extension request from Caucus for Media Diversity. Replies were due on May 17, 1993. Although we did not provide for the submission of further pleadings, several parties filed responses to Fox's May 17 reply comments. In order that we may develop the fullest record possible, we have elected to consider, over Fox's objection, all filings submitted in this proceeding, even those filed after the May 17 reply date.

[2] At the time of this acquisition Fox was known as News America Television Incorporated and WNYW as WNEW-TV.

[3] This transaction, involving the assignment of WNYW to Fox, also included, among others, WFLD-TV, a Chicago, Illinois television station. Murdoch's then-ownership of the *Chicago Sun-Times* created a second broadcast-newspaper cross-ownership violation, which was also waived for a two-year period. *Metromedia Radio & Television, Inc.*, 102 F.C.C. 2d at 1353. Murdoch disposed of the *Sun-Times* shortly after obtaining the temporary waiver. *See Health and Medicine Policy Group v. FCC*, 807 F.2d 1038, 1040 n.3 (D.C. Cir. 1986).

4. It was at this time that Murdoch's interest in the *Post* was apparently rekindled, but as a creditor rather than as a potential buyer. Based upon the terms of the 1988 purchase and sale agreement with Kalikow, according to News Corp. executive vice president and group general counsel Arthur M. Siskind, Kalikow and the *Post*'s parent company, The New York Post Co., Inc., owned by Kalikow, agreed to perform certain obligations for which News America Publishing Incorporated (News America), the publishing unit of News Corp., remained contingently liable. In addition, News America was granted a right of first refusal to purchase the newspaper in the event Kalikow proposed to dispose of it. As a contingent creditor, therefore, News America became, and still remains, a member of the creditors' committee in Kalikow's personal bankruptcy, attending committee meetings and bankruptcy hearings in Kalikow's, and later the *Post*'s, bankruptcy proceedings.

5. In February 1992, Kalikow notes, he entered into negotiations with Hollinger, Inc., one of the world's leading newspaper publishers, and its principal Conrad Black, represented by broker Veronis, Suhler & Associates, Inc. (VS&A), an investment banking firm serving the media and communications industry. Hollinger sought a joint venture arrangement with Kalikow in order to acquire the *New York Daily News* and to combine its operations with those of the *Post*. Several meetings with Black and VS&A ensued, but by the first part of April 1992 "we realized," Kalikow states, "that there was no way that we could do a deal with Mr. Black. . . ." Discussions continued for a short period thereafter.

6. By this time, however, according to Kalikow, preliminary conversations that had commenced between Kalikow and Apollo Investment Fund as early as January 1992 had intensified. Represented by Leon Black, John Hannan and Jerry Finkelstein, Apollo, notes Kalikow, met with him often to work out the details of a proposed two-part transaction: Apollo would enter into a joint venture with Kalikow as to his real estate holdings and into a separate joint venture withx Bankers Trust Company and Kalikow as to the *Post*. These discussions, which apparently widened to include the creditors' committee in Kalikow's bankruptcy proceeding, resulted in a series of "term sheets" which described the proposed transactions. Nevertheless, Kalikow states, Apollo and his creditors' committee "could not come together" on the first part of the transaction, the real estate holdings, but negotiations were maintained with regard to the *Post*. In the meantime, Kalikow obtained a $3 million line of credit from Bankers Trust Company, enabling the *Post* to operate through 1992.

7. During July and August 1992, the Apollo-Bankers Trust negotiations with Kalikow progressed while Kalikow sought a separate deal with outside investors for his real estate assets. In October 1992, Kalikow notes, he was told by Apollo and Bankers Trust that talks were advancing well and he no longer needed to attend meetings. The transaction, he states he was told, was to be concluded in a "short time." Despite "rumors" to the contrary, Kalikow contends, he was assured in December 1992 by both Apollo and Bankers Trust that a deal was in the offing. However, in early January 1993, the Apollo-Bankers Trust deal "had broken down," Kalikow states, and the Bankers Trust working capital loan was clearly inadequate to cover the *Post*'s operating costs. Although Bankers Trust "grudgingly" agreed to extend the term of the loan, according to Kalikow, it did so on two conditions: that operating losses at the *Post* be eliminated and that a substitute source of funds for the newspaper be found.

8. Efforts to comply with the first condition, Kalikow states, resulted in increasing the *Post*'s newsstand price from 40 to 50 cents and securing, with cooperation from the trade unions, a 20 percent reduction in labor costs. As for the second condition, Kalikow indicates, he approached "any possible investor who had previously expressed any type of interest in either an outright purchase or a joint venture with the *New York Post*." On January 19, 1993, Kalikow met with representatives of Marvin Davis of Davis Companies. Several other meetings occurred, including a walk through the *Post* plant, but, Kalikow maintains, although he made several follow-up telephone calls, he never heard from Davis again. And on January 20, Kalikow met with Dusty Rhodes of *National Review*, which also resulted in no further action.

9. In need of a continuing line of credit during the extended search for investors, Kalikow entered around-the-clock negotiations with Bankers Trust over the weekend of January 23 and 24, 1993. No agreement was reached. But while he was at the *Post*'s offices on Sunday, January 24, to inform the staff that publication of the newspaper would be suspended, Kalikow states, he received a telephone call from Steven Hoffenberg, principal of Towers Financial Corporation. Hoffenberg, who, Kalikow notes, apparently had become interested in the *Post* through the efforts of Governor Mario Cuomo's staff in locating a purchaser, agreed to assume the role of lender while he arranged to purchase the *Post* and its real property. That entailed, among other things, obtaining consent of the bankruptcy court presiding over Kalikow's personal bankruptcy. However, a lawsuit stemming from a Securities and Exchange Commission investigation of Hoffenberg resulted in the freezing of Hoffenberg's personal assets and those of Towers Financial, effectively precluding him from purchasing the *Post*. Undaunted, Hoffenberg, according to Kalikow, sought to enlist other investors in the purchase of the *Post*, eventually reaching an agreement in late February with real estate developer Abraham Hirschfeld. After a falling out with Hoffenberg in early March, Kalikow states, Hirschfeld emerged as the sole potential purchaser of the newspaper.

10. Because the contracts with both Hoffenberg and Hirschfeld contained non-solicitation provisions, Kalikow terminated his search for other offers until the court in Kalikow's personal bankruptcy proceeding ordered the recommencement of solicitation as a condition of its approval of the Hirschfeld contract. Several potential purchasers emerged, according to Kalikow, including Lester Ewell, who dispatched a signed contract to Kalikow, but failed to demonstrate his good faith to the court. Kalikow also met with, and provided information to, Ronald Lauder of Estee Lauder, Leon Charney, Mortimer Zuckerman of Boston Properties and owner of New York's *Daily News*, James Nederlander, Kenneth Lipper of Lipper Company, Inc., and Thomas Tisch, all of whom, Kalikow states, "were looking for assurances of a profitable investment which we were not able to provide." On March 12, 1993, the court granted Hirschfeld operational control of the *Post*, based in part, according to the Creditors, on his pledge to invest at least $3 million in the newspaper. Chaos followed, the Creditors state: Hirschfeld fired the *Post*'s editor-in-chief and three other editors and columnists, triggering a "revolt" against Hirschfeld by the editorial staff.

11. As the editorial situation deteriorated and it became apparent, Kalikow states, that Hirschfeld also was unable to complete the purchase, Kalikow, on March 15, 1993, placed the *Post*'s parent company, New York Post Co., in bankruptcy. The *Post*'s overall conditions were dire, according to Patrick Purcell, the newly appointed publisher who held that post from 1987 until the sale to Kalikow in 1988. Not only was the editorial staff depleted of key members and morale, Purcell states, but circulation, which had hovered around 500,000 in early 1988, when Murdoch disposed of the *Post*, now stood at 380,636 daily. Newsprint and ink supplies, notes production director Al Palmer, became scarce when the vendors of these products, after three *Post* checks were returned for insufficient funds, refused to deal with the newspaper on other than an advance-payment basis. Advertisers, Purcell notes, became reluctant to place advertisements in the *Post* following the issuance of a 99-count criminal indictment against the newspaper and some of its personnel for falsifying circulation records and defrauding advertisers. They either abandoned the paper or enjoyed the free rebate program imposed by the district attorney during the most lucrative advertising months, from August to December 1992. While the newspaper's revenues declined, Purcell adds, so did the number of payments made by the *Post:* little beyond net paychecks had been paid in the two weeks prior to March 29. Employee pension, welfare and 401K deductions went unpaid. And, according to Purcell, the *Post*'s failure to pay federal withholding taxes resulted in a liability to the Internal Revenue Service of approximately $3 million, which remained outstanding from the fourth quarter of 1992. Moreover, providers of such basic services as cleaning, security, cafeteria and maintenance had either refused to contract with the *Post* or threatened to terminate those services.

12. As a result, prior to the week of March 25, 1993, News Corp.'s general counsel Siskind states, Murdoch received numerous entreaties to purchase the *Post:* from New York Governor Mario Cuomo, one of New York's United States senators, various community leaders, as well as from *Post* suppliers, employees, and the employees' labor union representatives. Aware of the substantial losses incurred by the *Post*, the amount of working capital needed to sustain its operations, and the improvements in the economies and operations required to revitalize the paper, Murdoch, according to Siskind, agreed to assume management of the *Post* conditioned upon: his obtaining a permanent waiver of the Commission's cross-ownership rule and his making an offer to purchase the *Post*'s assets, which included his negotiating new arrangements with the paper's unions. On March 29, 1993, NYP, a subsidiary of News America executed with the New York Post Co. a management agreement approved the next day by the United States Bankruptcy Court for the Southern District of New York. *In re The New York Post Co., Inc. (Bankruptcy Order)*, No. 93-B-41306 (Bankr. S.D. N.Y. March 30, 1993)(interim order authorizing debtor New York Post Co. to enter into management agreement with NYP). The agreement provides for termination of the later of June 1, 1993 or 60 days from March 29, 1993, the date the agreement was executed. NYP has the right, "in its sole discretion," according to the agreement, to extend the termination date for an additional 30 days in the event it has not obtained a waiver from the Commission by that date.

PROCEDURAL ISSUES

13. *Ripeness.* Many of the commenters challenging Fox's waiver request assert that the request is not "ripe" for Commission adjudication because Murdoch has neither acquired the *Post* nor made a commitment toward that end. Nor, they note, has the bankruptcy court made a final determination as to whether a sale to Murdoch would benefit the debtor and its creditors. Further, the commenters note, and Fox concedes, Murdoch may not even prevail before the court. Murdoch, in essence, NAACP argues, is asking for an "advance declaratory ruling," and although, it acknowledges, an agency may issue a declaratory ruling, administrative practice "prefers" case-or-controversy adjudication. NAACP suggests, therefore, that we hold this matter in abeyance until bidding for the *Post* is completed. Otherwise, it adds, Commission grant of the cross-ownership waiver would confer its "imprimatur," thereby giving Murdoch the "inside track" to becoming the ultimate buyer.

14. We recognize that the Fox waiver request before us does, in fact, lack a definitive purchase agreement or court-approved long-term plan. As NAACP notes, a request for declaratory ruling is not restricted, as are proceedings of federal courts, to "cases and controversies" within the meaning of Article III of the Constitution. *North Carolina Utilities Commission v. FCC*, 537 F.2d 787, 790 n.2 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976).: [4] Indeed, Sections 4(i) and (j) of the Communications Act, 47 C.F.R. §154, bestow upon the Commission the broad power to issue orders consistent with the Act "as may be necessary in the execution of its functions." And Section 554(e) of the Administrative Procedure Act, 5 U.S.C. §554(e), provides that the Commission "may issue a declaratory order to terminate a controversy or remove uncertainty." *See also* 47 C.F.R. §1.2. Although the Commission is not required to issue a declaratory order "merely because a broadcaster asks for one," it is clearly within the discretion of the Commission to issue such order on a licensee's proposal. *Yale Broadcasting Company v. FCC*, 478 F.2d 594, 602 (D.C. Cir. 1973).

15. The unique and severe financial situation of the *Post* that apparently confronts the bankruptcy court in the case before us, as described above, warrants our immediate attention.[5] Moreover, we reject Fleischman's and NAACP's

[4] In that case, the court rejected the contention that the Commission's issuance of a declaratory order was premature and unwarranted because state agencies were merely threatening to impose restrictions affecting communications equipment and had not as yet adopted such provisions. In the case before us, however, the waiver request is based on more than mere speculation and hypothesis: Fox has represented to the Commission Murdoch's intentions to permanently acquire the *Post;* Murdoch has assumed control of the newspaper pursuant to a court-approved management agreement; and the bankruptcy court granted NYP shared exclusivity with the debtor-New York Post Co. to file a plan of reorganization and solicit acceptances thereto. *Bankruptcy Order, supra*, at'5.:

[5] Although we are free to issue a declaratory ruling even as to a hypothetical situation, we are persuaded here that Murdoch's request is not hypothetical. We refer in this regard to Murdoch's financial contributions under the interim management agreement, totalling $4.224 million in the first six weeks

attempts to draw parallels between Fox's request and an assignment application, the latter of which requires submission of a definitive, executed purchase and sale agreement.[6] The request before us does not involve the acquisition of a broadcast station, whose transactional structure, unlike that of a newspaper, must comport with statutory and regulatory restrictions, including reversionary, future and alien ownership interests, as well as unauthorized transfers of control. Contrary to some commenters' suggestions, the submission of an executed agreement by parties to a long-form application provides no guarantees that consummation will result: our grant of such application is permissive and nothmandatory. Additionally, as discussed further below, under our public interest mandate, we have an obligation to consider a variety of factors, including the national policy underlying other federal laws, such as the bankruptcy laws pertinent to the case before us. *See LaRose v. FCC*, 494 F.2d 1145, 1146 n.2 (D.C. Cir. 1974). We believe that a decision to act now on Fox's request would fulfill that obligation by minimizing any conflict with the tripartite policy objective of bankruptcy law: equality of distribution among creditors, a fresh start for debtors, and the efficient and economical administration of cases. *See Report of the Commission on the Bankruptcy Laws of the United States*, H.R. Doc. No. 93-137, 93d. Cong., 1st Sess., Pts. I and II, chapter 3 (1973).

16. Under the Bankruptcy Code, the assets of a Chapter 11 entity, such as the *Post*'s parent company, may be sold pursuant to a Section 363(b) sale, 11 U.S.C. §363(b), or transferred to a third party under a plan of reorganization, 11 U.S.C. §1101 *et seq*. Whichever mechanism is employed, according to the Creditors, Champion, a commenter which maintains it has pursued acquisition of the *Post* since March 15, and other interested parties will be given notice and the opportunity to present offers because "|s|erious competing bids will help to increase the ultimate recovery for unsecured creditors."[8] Commission action today, therefore, regardless of the outcome, will remove the "uncertainty" of Murdoch's eligibility under the Commission's rules and regulations to permanently acquire the *Post*, thereby permitting the court, the creditors, the debtor and any other interested parties to proceed with the disposition of the newspaper. Accordingly, for the reasons discussed below, we believe the public interest isbest served by our consideration of Murdoch's permanent waiver request at this time, so that the court has before it the full complement of eligible bidders.

17. The Commission takes no position on whether Murdoch is the newspaper's only viable buyer, as Fox alleges. Our action is not intended to suggest any Commission or regulatory preference for Murdoch or in any other way to influence the bankruptcy court in its disposal of the *Post*. However, to exclude Murdoch as a potential purchaser may well ultimately disserve the underlying diversity purposes of the cross-ownership rule and would not accord appropriate deference to the policies and objectives of bankruptcy law.

18. *Commission Jurisdiction*. Fleischman argues that because Commission jurisdiction is limited to matters relating to "communication by wire and radio," quoting Section 1 of the Act, 47 U.S.C. §151, the preservation and economic well-being of daily newspapers lies outside its statutory authority. The Commission's jurisdiction, Fleischman concedes, does empower the Commission to preclude licensees from owning collocated daily newspapers, as established in *Multiple Ownership - Second Report and Order in Docket No. 18110 (Second Report and Order)*, 50 F.C.C. 2d 1046, *on recon. (Second Report and Order Recon.)*, 53 F.C.C. 2d 589 (1975), *aff'd sub nom. FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978). Yet, Fleischman contends, although it may be appropriate for the Commission to consider the financial health of a television station when presented with a request for waiver of the broadcast-newspaper cross-ownership rule, the Commission may not, conversely, consider the financial situation of a daily newspaper. To do so, Fleischman and

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alone, combined with his broad publishing experience, his past ownership of the *Post*, and his existing contractual contingent liabilities associated with the newspaper. Champion attempts to diminish the risk assumed by Murdoch in advancing millions of dollars to the *Post* during the interim management agreement, characterizing the funds as debtor-in-possession financing, which have superpriority under bankruptcy law. We note, however, that the March 30 bankruptcy court order states that Murdoch's lien and security interest on *Post* assets is expressly subordinated to those previously granted to Hoffenberg, Hirschfeld and the Internal Revenue Service. *Bankruptcy Order*, *supra*, at 7. Murdoch's financing of the *Post* in the interim, therefore, does not appear to be risk-free.

[6] Caucus and NAACP argue, citing *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956), *New Orleans Channel 20, Inc. v. FCC*, 830 F.2d 361 (D.C. Cir. 1987), and *Rio Grande Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968), that because there is no "deal" before us, we have an incomplete basis for reaching an informed decision. Yet, the common defect in those cases, regarding, respectively, national ownership limits, additional time with which to construct, and the clear channel policy, were the applicants' utter failures to set forth specific reasons, sufficient if true, to justify grant of the requests. In contrast, as discussed below, Fox has provided specific and detailed evidence that supports our grant of its waiver request.

[7] Fleischman and NAACP contend that Fox's reliance on *Channel 33, Inc.*, 64 R.R. 2d 1705 (1988), for the proposition that the Commission give weight to bankruptcy court findings, is misplaced. The applicants seeking waiver of the duopoly rule in that case were creditors of a bankrupt licensee whose plan of reorganization had been reviewed and approved by the bankruptcy court. However, the bankruptcy court in the case before us, Fleischman argues, has yet to reach a determination as to whether a sale to Murdoch "would serve other federal policies." We disagree with Fleischman's premise. The instruction to the Commission in *LaRose v. FCC*, 494 F.2d at 1146 n.2, that we "constantly be alert to determine whether [our] policies might conflict with other federal policies and whether such conflict can be minimized." did not limit such accommodation to only the final stage of the bankruptcy proceeding. *See also Seraphim Corporation*, 4 F.C.C. Rcd 8819, 8821 (1989)(Commission grant of transfer of control conditioned on bankruptcy court's approval of plan of reorganization upon which transfer is based). In the case before us, where it is the newspaper and not the broadcast station that is in bankruptcy, we believe we are able to make the appropriate public interest determinations at this stage of the court proceedings, without detriment to our own processes and in furtherance of minimizing potential conflicts with the federal bankruptcy laws' policy of resolving cases in an impartial, expert and speedy manner. *See Report of the Commission on the Bankruptcy Laws of the United States*, *supra*.

[8] Champion subsequently removed itself from consideration as a bidder for the *Post*, after it concluded that its acquisition proposal was not viable. *See* Letter from Michael D. Brofman to Howard Seife (filed with the Commission on June 29, 1993).

NAACP assert, would allow the failing newspaper to survive by siphoning funds from the strong, commonly owned, collocated television station.

19. In affirming the cross-ownership rules, the Supreme Court noted that it was not inconsistent with the statutory scheme for the Commission to conclude that "maximum benefit to the 'public interest' would follow from allocation of broadcast licenses so as to promote diversification of the mass media as a whole." *FCC v. NCCB*, 436 U.S. at 798. While the Commission has no authority to regulate newspapers *per se*, it has authority under the statute to limit a broadcast licensee's ownership of such media. It follows, therefore, that if the Commission has authority to restrict a broadcaster's ownership of a collocated newspaper in the public interest, it also has authority to waive such a restriction in the public interest. Indeed, the Supreme Court found that the "reasonableness" of the cross-ownership regulations as a means for achieving diversification was underscored by the fact that waivers are available from both the prospective and the divestiture rules. *Id.* at 802 n.20. The court, in *Health & Medicine Policy Research Group v. FCC*, 807 F.2d 1038, 1045 (D.C. Cir 1986), expressly recognized the Commission's authority to consider, in evaluating a waiver request, the "'harsh realities' facing newspapers competing against a dominant paper. . .."[9]

WAIVER OF BROADCAST-NEWSPAPER CROSS-OWNERSHIP RULE

20. Murdoch's control of the *Post*,[10] even absent his ultimate acquisition of that newspaper, and his concomitant control of Fox, the licensee of WNYW, come within the ambit of Section 73.3555(d)(3), the television broadcast-newspaper cross-ownership rule. That rule provides that "[n]o license for [a] . . . TV broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates, or controls a daily newspaper and the grant of such license will result in" the Grade A contour of that television station encompassing the entire community in which such newspaper is published. However, if a broadcast licensee acquires a daily newspaper in the same market, the rule effectively provides for an automatic temporary waiver in that the licensee must dispose of the broadcast station within one year or by the time of its next renewal, whichever is longer. *Second Report and Order*, 50 F.C.C. 2d at 1076 n.25. Here, because the renewal period for WNYW does not expire until June 1, 1994, Murdoch is operating under a temporary waiver of the rule, and its management of, and financing for, the *Post*, as Fox correctly notes, does not require Commission approval at this time.

21. *Fox's waiver request.* A permanent waiver of the broadcast-newspaper cross-ownership rule is sought at this time, according to Fox, because it is an "essential initial step" in a long process of wooing advertisers and readers, who will not return, notes News Corp. general counsel Siskind, "unless and until" they are assured of the long-term viability of the *Post*. And until the Commission acts, guaranteeing that Murdoch will not have to once again divest the *Post*, Fox argues, it will not be possible to conclude negotiations "in a meaningful manner" with the labor unions representing the newspaper's employees.

22. Fox's request rests primarily on two grounds. First, it argues that no other "viable" purchaser, other than Murdoch, has demonstrated a willingness to undertake the financial burden of stabilizing and revitalizing the *Post*. Murdoch's commitment to operate the troubled newspaper during the term of the management plan, Fox notes, will have amounted to a cash infusion of up to $350,000 per week, nearly $100,000 more per week than anticipated, for a total of several million dollars.[11] But beyond serving as financier, Fox argues, Murdoch brings to the *Post* the managerial, technical and editorial skills required to operate in New York City's highly competitive news environment. In short, Fox contends, temporary measures "will not suffice to remedy problems that have been years in the making," and NYP cannot "undertake the enormous commitment of time and human and financial capital" required to revitalize the *Post* without the certainty of a permanent waiver of the cross-ownership rule.

23. Second, Fox asserts that application of the newspaper cross-ownership rule to the *Post*'s situation would disserve the underlying policy of diversity, resulting instead in the elimination of an important competitive voice and source of viewpoint. According to Fox, the New York City area of dominant influence (ADI), comprising 29 counties in New York, New Jersey and Connecticut, has 20 television stations, 97 AM and FM radio stations, 62 percent cable penetration and cable systems providing at least 56 different satellite-delivered program services, 36 daily newspapers with an average aggregate daily circulation of 4.5 million, and 338 weekly newspapers. Murdoch's ownership of the *Post* and WNYW, therefore, Fox contends, will result in no "meaningful" diminution in diversity, but will preserve it by rescuing "an important competitive voice and source of viewpoint diversity."

24. Given New York City's diversity of voices, Fox asserts, joint ownership of the *Post* and WNYW will neither effect an undue concentration of media control nor confer competitive advantage on Murdoch's media properties. Of the four daily newspapers in the city of New York, the *New York Post* 's average daily and Saturday circulations rank last, Fox notes, based on Audit Bureau of Circulation figures, and has declined significantly since the close of the 1991 audit year. For the week ended March 20, 1993, average daily circulation was 380,636, down 24 percent from September 1991, and Saturday circulation was 326,184, down 18 percent in the same period. The *Post* does not publish a Sunday edition. Advertising sales for the *Post* in 1992, whether measured in ad inches or ad pages,

[9] The court further stated: "We believe it was not unreasonable, and certainly not 'arbitrary' or 'capricious,' for the Commission to deem this affidavit [regarding the inability to obtain a fair price], together with the FCC's earlier recognition [in *Crosby N. Boyd*, 57 F.C.C. 2d 475 (1976)] of newspaper market realities, an appropriate showing' of an inability to sell at anything but an artificially depressed price.'" *Health & Medicine Policy Research Group v. FCC*, 807 F.2d at 1045.

[10] Pursuant to the terms of the management agreement, NYP is authorized to operate the *Post*'s business, with full business and editorial control.

[11] Since assuming control of the *Post* on March 29, until mid-May, according to News Corp's Siskind, NYP has provided $4.224 million, $2.367 million of which represented working capital. The balance, $1.857 million, has been applied to underwriting the $309,600 average weekly losses incurred since the end of March.

according to the Audit Bureau of Circulation, were the lowest of the city's four dailies, reaching only two-thirds the sales level of third-ranked *New York Times* and approximately one-fourth that of the top-ranked *Newsday*.

25. Accordingly, states William Shew, director of Economic Studies at Arthur Andersen Economic Consulting, the *New York Post*'s 1992 advertising revenue of $32.8 million represents only one percent of the New York advertising market of slightly more than $3 billion and WNYW's 1992 advertising revenue of $151.7 million represents less than five percent. The combined six-percent share under Murdoch's ownership of the two media may be even smaller, Shew notes, because his study of the New York advertising market, based upon data compiled by Leading National Advertisers (LNA), a source widely used for such studies, excludes many media outlets. LNA's data universe is composed of only 10 of the more than 350 daily and weekly newspapers, six of the 13 commercial television stations, 24 of the 52 commercial radio stations, and the outdoor advertising of selected operators in nine areas. Cable television and periodicals, including local publications such as *New York Magazine*, *The New Yorker* and *Cranes*, are entirely excluded from LNA's market construction.[12]

26. Fox concludes that the Commission never before been presented with such a "uniquely compelling" case for permanent waiver of the cross-ownership rule. Murdoch, according to Fox, has agreed to furnish the funds and expertise necessary to resuscitate the *Post*, and permanent waiver will permit him to implement a plan to save a major daily newspaper, thereby advancing the diversity objective of the rule.

27. *Comments*. At the outset, some of the commenters question whether the Commission has the authority to grant permanent waivers to allow a newly created newspaper-television combination. From the beginning, Fleischman argues, the order promulgating the cross-ownership rule, *Second Report and Order*, 50 F.C.C. 2d at 1085, provided only for waivers of "reasonable duration" and, according to Caucus, waivers were contemplated only to continue a current combination where appropriate, not to create new combinations.[13] Nor, most of the commenters assert, has the Commission ever granted a permanent waiver for a new combination. Grant of a permanent waiver, then, according to NAACP, would depart substantially from precedent.

28. Further militating against Fox's obtaining a permanent waiver, according to several of the commenters, is the Congressional mandate, in Public Law 102-395, 106 Stat. 1846 (1992), "|t|hat none of the funds appropriated by this |Appropriations| Act may be used to repeal, to retroactively apply changes in, or to begin or continue a reexamination of the rules and the policies established to administer" the broadcast-newspaper cross-ownership rule. Because it is not Commission policy to grant permanent waivers of that rule, Fleischman and NAACP assert, such a waiver could not be granted without "radical revision" and "reexamination" of existing policy, actions barred by Congress.

29. Assuming that it is appropriate for the Commission to consider the waiver request, the commenters contend, Fox's request, even as supplemented on April 20 in response to the Commission's inquiries, fails to sustain the heavy burden required of applicants seeking a permanent waiver of the cross-ownership rule. Foremost, as support for its contention that the *Post* is on the brink of failure, Fox, Fleischman asserts, relies entirely upon newspaper accounts, of which the Commission may not take official notice, and upon anecdotal accounts of *Post* employees, which are "equally devoid of relevant facts." Now that Murdoch controls the *Post*, Fleischman argues, Fox should submit audited financial statements, balance sheets, income and expense ledgers, and other data "before it can be heard to complain about the economic well-being of the *Post*." Until then, the financial data submitted in *Washington Star*, a broadcast-newspaper cross-ownership case in which an evidentiary hearing was ordered, "far exceed" Fox's showing here, Caucus asserts. Moreover, *Washington Star*, according to Fleischman, involved a daily newspaper confronted with financial problems "at least as dire" as those alleged with regard to the *Post*. And Kalikow's anecdotal descriptions of the "purported" efforts to sell, Fleischman contends, are "strikingly similar" to those before the Commission in that early case, in which the Commission found attempts to sell, Fleischman argues, as "sadly wanting." Accordingly, commenters urge, a hearing is equally warranted in connection with Fox's waiver request.

30. With regard to Fox's assertion that Murdoch signifies the only viable route for revival of the *Post*, Champion, in its comments to the Commission, provides a chronological narrative of its attempts to acquire the faltering newspaper. Headquartered in Greenwich, Connecticut, Champion, a private company owned by Mahmoud A. Wahba and Suzanne Patterson Wahba, states that it attended a March 19, 1993 hearing in the *Post* bankruptcy proceeding and, bearing a certified check for $1 million, "attempted to apprise the court" of its interest in the newspaper. However, Champion notes, its proposal was not addressed because the offers of other bidders was not a matter before the court. On March 22, Champion states, it informed by letter the bankruptcy court judge, the U.S. Trustee and counsel for the *Post* of its continuing interest in obtaining the newspaper. The next day, on March 23, it entered into a memorandum of understanding regarding purchase of the assets of the *Post* with the New York Post Co., signed by the company's vice president and controller Stephen Bumbaca. Execution of an associated asset purchase agreement was subject to the approval of the *Post* creditors' committee and the proffering of evidence that Bumbaca or "other authorized official" was empowered to execute the agreement on behalf of the New York Post Co.

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[12] Moreover, LNA includes in its tally only those advertisers with total ad expenditures for the year exceeding $10,000 on a media category. Thus, Shew indicates, expenditures by a given advertiser of $5,000 on radio would not be reflected in the LNA totals.

[13] Yet Caucus does not argue that there are no circumstances under which the grant of a permanent waiver of the cross-ownership rule might be appropriate. What it does argue, however, is that such a grant would permit "the world's largest media company" to own both a VHF "network" television station and a daily newspaper in the same media market, thereby eviscerating the "continued viability" of the rule.

31. Champion presented its offer to the creditors' committee on March 25, again bearing a certified check for $1 million as evidence of good faith. The Creditors, however, in their comments to the Commission, state that Champion's offer was rejected as "unacceptable" for several reasons, including a "deficient" purchase price, "unrealistic" union concessions, the lack of provisions for assuming the *Post*'s liabilities, and insufficient amounts of working capital. Accordingly, on March 26 and May 12, according to the Creditors, their counsel informed Champion that they were not interested in Champion's offer.

32. Shortly after Champion's presentation to the creditors' committee on March 25, the bankruptcy court held a telephonic conference with representatives of that committee, as well as with then-court-approved *Post* manager Hirschfeld and a Murdoch representative. The conference resulted in preliminary approval of Murdoch's management agreement and Hirschfeld's eventual withdrawal. However, Champion, it notes, was not "invited" to the conference that day or to any other conferences or hearings thereafter. Nevertheless, Champion notified the creditors' committee in writing on March 26, April 23 and April 28 of its continuing interest in the *Post*. In sum, Champion, which claims total revenues of about $100 million through its affiliates in, among other things, real estate, petroleum storage terminals and oil distribution, states that it also remains a "viable buyer" of the *Post*. Champion maintains it was offered the "full cooperation" of the *Post*'s editorial board, administrative management and the unions, and that it has a plan to restore financial vitality to the newspaper.[14]

33. Additionally, some commenters argue that allowing further expansion of Murdoch's media holdings would be inconsistent with the Commission goal of promoting diversity.[15] Rather than engender diversity, they add, Fox's acquisition of the *Post* would combine two previously independent voices, that of the *Post* and that of WNYW. The reassignment of journalists from other of Murdoch's News Corp. operations around the country, as described in Fox's waiver request, Fleischman contends, confirms the loss of the *Post*'s independence. As for Fox's assertion that the New York media marketplace is "uniquely competitive," Fleischman asserts, the Commission did not predicate grant of permanent waivers on the level of competitiveness of the media in a particular city. Furthermore, Fox's litany of the numerous and various media available in the New York ADI, Fleischman argues, are irrelevant in that the Commission concluded in *Second Report and Order* and *Second Report and Order Recon.* that nothing but the number of local daily newspapers and city-grade television signals has any bearing on the diversity issue.

34. Moreover, Fox's definition of "diversity" among the daily newspapers in New York City, in which 60 percent of the residents are people of color, Fulani asserts, involves merely "nuances" of difference among white corporate owners and not "genuine" diversity. The death of the *Post*, according to Fulani and a large number of the letters submitted in this proceeding, would free up tens of millions of dollars of advertising potential for minority-owned newspapers. However, even if the Commission denies Fox's waiver request, the *Post*'s demise, many commenters contend, is not a certainty. Indeed, denying Fox's request, Caucus suggests, would create an opportunity for minority newspaper owners and businesspersons to purchase, or merge with, the *Post*.

35. Additionally, NBMC and the majority of letter-writers note their concerns that Murdoch will continue what they term the *Post*'s "policies" of attacking and denigrating African-Americans, their institutions and community. This is a policy, many letters claim, Murdoch practiced when he previously published the newspaper. Thus, NABOB contends, the collapse of the *Post*, perceived as a racist newspaper by some African-American leaders, might yield a "positive benefit."

36. Finally, in the event the Commission does grant Fox's request for permanent waiver, the anticompetitive effects of Murdoch's ownership of both WNYW and of the *Post* should be guarded against, contend many commenters. For example, both Fleischman and NAACP note, the Commission could require that the two commonly held media maintain separate editorial, reportorial and sales staffs, as well as refrain from combination advertising and discrimination against media competitors. Abbreviating WNYW's license term to three, instead of five, years, according to MAP, and/or conditioning any grant are other avenues for properly "delimiting an "open-ended" permanent waiver. Such conditions, MAP asserts, might include requiring that Fox, as part of the WNYW license renewal application, file a "special report" reviewing any changed circumstances, and that the renewal be acted upon by the full Commission rather than the staff.[16] Additionally, Fleischman states that the Commission should require that the collocated newspaper carry "fair" program listings of all television stations. WLIG, however, contends that its recent experience with the Murdoch-controlled *Post*, in successfully gaining inclusion in the newspaper's listing grid for its Channel 55 in Riverhead, New York, "demonstrates that Fox does not intend to misuse" cross-ownership of WNYW and the *Post*.

37. *Discussion.* The proscription against common ownership interests in collocated newspapers and broadcast stations emanated from the twin fundamental principles underlying the Commission's multiple ownership rules: the promotion of maximum diversification of program and service viewpoints and the prevention of undue concentration of economic power. *Second Report and Order*, 50 F.C.C. 2d at 1074. In establishing the broadcast-newspaper cross-ownership rule, however, the Commission noted that these objectives are not coequal in that the policy of competition must sometimes yield to "the even higher goals of diversity and the delivery of quality broadcasting service to the American people." *Second Report and Order*, 50 F.C.C. 2d at 1074. The rule was thus crafted to "grandfather" most

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[14] *But see* Comments of Creditors at 4-6; *see also* note 8, *supra*.

[15] Murdoch controls Fox, the licensee of television stations in eight major markets: KTTV, Los Angeles; WTTG, Washington, D.C.; WFLD, Chicago; WNYW, New York City; KDAF, Dallas; KRIV, Houston; KSTU, Salt Lake City; and WATL, Atlanta. Murdoch also controls News America Publishing Inc., the publisher of the *Boston Herald*, the *London Times*, and *TV Guide*.

[16] Alternatively, or in addition, MAP suggests, the Commission could require Fox to file annual or semi-annual reports, to include, among other things, the competitive viability of the *Post* as a "stand-alone" property and the state of competition in the New York City market. In this way, MAP contends, the Commission could order corrective action or consider those issues in WNYW's renewal proceeding.

then-existing combinations[17] and to apply prospectively to new ownership patterns however created, whether by initial application and construction or by acquisition through assignment or transfer of control.[18] *Id.* at 1076.

38. Despite the broad nature of the rule, or because of it, the Commission expressly contemplated waivers for new cross-ownership patterns, as a "protection" in cases where application would be "unduly harsh." *Id.* at 1077; *FCC v. NCCB*, 436 U.S. at 786 n.9. Waivers were devised to accommodate four such situations: (1) where there is an inability to dispose of an interest to conform to the rules; (2) where the only sale possible is at an artificially depressed price; (3) where separate ownership and operation of the newspaper and station cannot be supported in the locality; and (4) where, for whatever reason, the purposes of the rule would be disserved by divestiture.[19] *Second Report and Order*, 50 F.C.C. 2d at 1084-85. From the rule's inception, the Commission envisioned waivers of permanent, as well as, temporary duration. *Id.* at 1085; *News America Publishing, Inc. v. FCC*, 844 F.2d 800, 803 (D.C. Cir. 1988).

39. Corresponding to each of the four categories is the level of showing required of an applicant seeking a waiver. With regard to the first category, the Commission delineated a tripartite showing: (1) a full description of the effort made to sell that interest; (2) the price at which it was listed; and (3) a certification of a newspaper (or broadcast station) broker that in his or her view this price is consistent with the fair market value of the property in question. *Id.* at 1084. An applicant invoking the second waiver category, where the only sale possible is at an artificially depressed price, must accompany its request with an "appropriate showing" of the fair value and the inability to obtain such a price. *Id.* at 1085 n.46. With regard to the third category, that separate ownership and operation of the newspaper and station cannot be supported in the locality, the Commission provided no specific guidance at that time on the showing required. As to the fourth category, "a catch-all provision," *Health & Medicine Policy Research Group v. FCC*, 807 F.2d at 1042, the Commission specified that if it could be shown, "for whatever reason," that the purposes of the rule would be better served by the proposed ownership pattern, waiver then would be warranted. *Second Report and Order*, 50 F.C.C. 2d at 1085. This waiver category countenances a myriad of arguments pertinent to the exigencies of a particular situation, so long as applicants requesting waiver refrain from relitigating issues previously resolved in the *Second Report and Order*. *Id.; Second Report and Order Recon.*, 53 F.C.C. 2d at 593-94. All "other special circumstances they think have a bearing on the appropriateness of granting waiver," therefore, are proper. *Second Report and Order*, 50 F.C.C. 2d at 1085 n.47.

40. Finally, the burden on an applicant such as Fox, which requests a permanent waiver for a new television-newspaper combination,[20] is "considerably heavier." *News America Publishing, Inc. v. FCC*, 844 F.2d at 803 (*citing Health & Medicine Policy Research Group v. FCC*, 807 F.2d at 1042-43). In the only request for permanent waiver, prior to the one before us, involving ownership of a new broadcast-newspaper combination, the Commission employed the three-part standard corresponding to the inability-to-sell waiver category.[21] *Washington Star Communications, Inc.*, 54 F.C.C. 2d 669 (1975). The Commission designated that case for hearing because it was unable to

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[17] Divestiture of existing combinations was limited to only "the most egregious cases," those in which there was common ownership of the only daily newspaper and of either the lone radio or television station encompassing the newspaper community with a city-grade signal. *Second Report and Order*, 50 F.C.C. 2d at 1080-1084, Appendix D, Appendix E (for a list of the 16 then-existing broadcast-newspaper combinations nationwide which the Commission specified as "egregious" cases and subject to divestiture). In other words, divestiture was ordered where the same party owned the only daily newspaper and the only broadcast station, whether television or radio, serving a community. However, common ownership of the sole daily and the sole radio station was exempted so long as a television station served the community. But a combination involving the daily and the only television station, regardless of the presence of a radio station, was subject to divestiture. Yet even those licensees targeted for divestiture were given approximately five years, until 1980, to do so. *Id.* at 1084.

[18] Exempt from prospective application of the rule are applications for assignment or transfer of control to heirs or legatees or those for *pro forma* changes in ownership. *Second Report and Order*, 50 F.C.C. 2d at 1076.

[19] Although these four grounds were established in the context of our divestiture requirement, the Commission, six months after promulgating the cross-ownership rule, in *Washington Star Communications, Inc.*, 54 F.C.C. 2d 669, 673 (1975), and later, in *Crosby N. Boyd*, 57 F.C.C. 2d 475, 483-84 (1976), deemed them equally applicable to "other aspects of our broadcast-newspaper prohibitions," including new ownership patterns, such as the one before the Commission in those cases. We recognize that those cases involved transfer of a previously grandfathered combination. Subsequently, however, the Commission applied the second category in granting a temporary waiver under circumstances involving a new, not previously grandfathered combination, thereby acknowledging that the waiver standards are, in fact, applicable to "new" combinations. *See Metromedia Radio & Television, Inc.*, 102 F.C.C. 2d 1334 (1985), *aff'd Health and Medicine Policy Research Group v. FCC*, 807 F.2d 1038 (D.C. Cir. 1986).

[20] NAACP, citing *Megamedia*, 67 F.C.C. 2d 1527, 1528 (1978), maintains that an essential element of "any" waiver request is a showing that less drastic alternatives are unavailable. That case, however, involved a request for waiver of the minimum distance rule, the standard for which expressly requires demonstration of the unsuitability of other fully spaced sites. *See, e.g., Caloosa Television Corporation*, 3 F.C.C. Rcd 3656, 3657 (1988), *recon. denied*, 4 F.C.C. Rcd 4762 (1989). The issue before us, whether to grant a waiver of the broadcast-newspaper cross-ownership rule, implicates a completely different standard, as specified *supra*.

[21] In a later case, *Field Communications Corporation*, 65 F.C.C. 2d 959 (1979) the Commission granted the only permanent waiver since promulgation of the television-newspaper broadcast rule. That case involved the transfer of control of Kaiser Broadcasting Corporation, licensee of five television stations, including Chicago station WFLD-TV, to Field, holder of a 22.5 percent interest in the licensee and publisher of two Chicago daily newspapers. Alluding to the "special circumstances" language of the catch-all waiver category, the Commission held that Field's reacquisition of the Chicago station constituted, in essence, an existing ownership pattern exempt from the cross-ownership rules: Field had controlled the original permittee and license of WFLD-TV prior to adoption of the broadcast-newspaper cross-ownership proscription; was responsible for construction and commencement of operation of the station; had previously assigned its controlling interest to its partner so as to ensure the economic viability of the station; had retained the right to make the first offer to reacquire the remaining 77.5 percent interest; and had continued to play a significant role in the affairs of the station. *Id.* at 961.

ascertain from the record that reasonable, good faith efforts had been made to dispose of the *Washington (D.C.) Star-News* so as to comport with the cross-ownership rule. The applicants subsequently amended their request, seeking a waiver of a maximum of three years in duration, and the Commission so granted that request based upon the fourth waiver category. *Crosby N. Boyd*, 57 F.C.C. 2d 475, 480, 484 (1976).

41. In view of the circumstances in this case, we believe it is appropriate to evaluate Fox's waiver request under the criteria of the fourth waiver category. Given the bankrupt status of the *Post*, the inability-to-sell waiver category that was addressed in *Washington Star* is inapplicable, in that the bankruptcy court has yet to approve the plan of any purchaser, including Murdoch. The question intrinsic to the first category, the inability to sell the newspaperat all, is one to be addressed by the bankruptcy court, the final arbiter as to whether Murdoch is the only viable purchaser. We do not intend by our decision here to interfere with the court's ongoing deliberative process, including its consideration of the possible existence of other buyers of the *Post*. Commission action in this regard is in accord with the directive of *LaRose v. FCC*, 494 F.2d at 1146 n.2 (1974), that we minimize, to the extent possible, any conflict between Commission policy and that of federal bankruptcy law. Our task at this stage of the bankruptcy proceeding, therefore, is to determine whether Murdoch's ownership of WNYW and the *Post*, in the event his plan is approved by the court, would be in the public interest.[22] Accordingly, the fourth category's "special circumstances" standard, in tandem with an evaluation of the diversity and competitiveness of the New York City market, also clearly implicated by the fourth category, provide an appropriate framework for assessment of the waiver request before us.

42. We conclude, under the "special circumstances" before us, that permanent waiver is warranted. First, we are persuaded that the risk to the viability of the *Post*, should we decline to grant Fox's request, thereby eliminating Murdoch as a potential bidder before the bankruptcy court, is very substantial. We believe that our interest in diversity would not be well served by taking that risk. Second, we conclude that grant of a permanent waiver is an appropriate accommodation between communications-related policies and bankruptcy-related policies. In this regard, our decision will facilitate the task of the debtor, the creditors and the bankruptcy court by removing any uncertainties arising from the existence of our cross-ownership rule.

43. We believe there is a substantial basis for reaching our conclusions. Not only is the *Post* now insolvent,[23] as Fox asserts, but, absent a waiver, its future is in doubt. VS&A, the investment banking firm and media broker which earlier performed an analysis of the *Post* and later represented Hollinger, Inc. in its 1992 efforts to negotiate a joint venture with Kalikow, concludes thatpthe newspaper's survival is dubious. In view of the substantial funds needed for capital improvements and for continuing operating losses, according to VS&A, "the issue is whether anyone would be willing to accept the risk of future liabilities of such magnitude" given the *Post*'s past performance and prospects.[24] Approximately $45 million, as well as expertise in the newspaper business, VS&A notes, are required to stabilize the staffing situation, attract readers and advertisers, deal effectively with the trade unions, and improve production quality. And an additional $30 million investment will be needed for rudimentary color equipment in order to compete with New York's other dailies, which, VS&A contends, plan to utilize color reproduction. Indeed, the *Post* was placed into bankruptcy only after Kalikow's more-than-16-month, good faith search[25] for a purchaser or investor willing to assume the newspaper's

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[22] Fleischman's urging, therefore, that we now require a solicitation process, similar to the one the court ordered Kalikow to engage in after the Hoffenberg contract terminated, is a matter within the court's jurisdiction and we need not consider it as an alternative in this forum. Accordingly, we leave to the bankruptcy court the determination of whether there are other potential purchasers and which of the proposals offers the best "price" and chances of viability for the *Post*.

[23] The bankruptcy court, in approving the NYP management agreement, stated that the *Post* "does not have funds sufficient to meet expenses necessary for the continued operation of its business," *Bankruptcy Order*, *supra*, at 3, thereby affirming the dire financial condition of the daily. It appears, therefore, that the *Post* was not placed in bankruptcy in order to evade the Commission's cross-ownership rule, but because its parent company was unable to continue its operations. Whether corruption, poor management or internal auditing procedures were the causes of the *Post*'s current financial troubles, as Fleischman and NAACP speculate, is irrelevant to our determination here. These are factors which the bankruptcy court may consider in reaching its decision with respect to the *Post*.

[24] Fleischman attacks the validity of VS&A's testimony, arguing that it is unsupported by affidavit, provides no indication as to how it obtained information regarding the *Post*, and includes no audited financial statement "or other necessary details." Moreover, Fleischman contends, the information VS&A submits is "vague and conclusory" and based on financial data last seen in late 1992. We note that VS&A's professional relationship with the *Post* dates from 1990, when the investment banking and brokerage firm was retained by Kalikow to provide advice in connection with the newspaper's activities and financial condition. This valuation assignment continued until the personal bankruptcy of Kalikow in August 1991. Subsequently, VS&A states, it remained in contact with *Post* management, but did not engage in investment banking activities during that period. From February through April 1992, VS&A, as the representative of Hollinger, Inc., which sought a joint venture with the *Post* and the *Daily News*, again became intimately familiar with the *Post*'s financial situation. It is apparent from the record before us, as confirmed by the now bankrupt status of the *Post*, that the newspaper's financial condition deteriorated after 1992, a year in which, according to VS&A's then-personal working knowledge, the newspaper was operating "significantly below break-even." We find, therefore, that VS&A's information was derived from valid, first-hand knowledge and sufficiently detailed to provide us with a basis for determining the financial condition of the *Post*.

[25] NAACP argues that Kalikow's and Fox's failure, or refusal, to provide the Commission with a specific dollar amount and/or financial terms with regard to the asking price for the *Post* should result in the dismissal of Fox's waiver request due to insufficient information. Unlike the applicants dismissed in the cases cited by NAACP, *Apple Communications*, 7 F.C.C. Rcd 1467 (1992)(dismissal for failure to submit a full scale transmitter site map pursuant to FM "hard look" processing standards), *Rita A. Capobianchi*, 6 F.C.C. Rcd 4631 (1991)(refusal to submit requested financial amendment), *Lorraine Walker Arms*, 5 F.C.C. Rcd 7013 (1990)(refusal to appear at hearing for cross examination), and *Beth Knight*, 7 F.C.C. Rcd 1889 (Rev. Bd. 1992)(refusal to produce requested relevant documents), Fox has provided the Commission with information relevant to our inquiry regarding the purported sale price of the *Post*.

liabilities.[26] Kalikow's exhaustion of a long list of potential purchasers/investors[27] and the *Post*'s precarious financial condition have apparently resulted in a small pool of potential purchasers. To our knowledge, only Murdoch and Champion have indicated a continuing interest in resuscitating the bankrupt *Post*.[28]

44. That the Commission has the authority to consider the "harsh realities" confronting newspapers was expressly recognized by the court in *Health & Medicine Policy Research Group v. FCC*, 807 F.2d at 1045. From the outset of the cross-ownership rules, we have made clear that, where our rules operated as an impediment to the survival of newspapers, that factor was an appropriate circumstance for waiver.[29] In the case before us, due in part to the shortage of potential buyers, there is evidence that Murdoch's ownership may be pivotal to the newspaper's survival.[30] Because of that, if the bankruptcy court were also to make a determination that Murdoch is the best qualified bidder, we think that a waiver would not be in conflict with our longstanding policies, especially in view of our determination, *infra*, that the purposes of the rule would not be disserved by a waiver.[31] Accordingly, our decision in this instance to afford a waiver in order to accommodate the policies underlying the federal bankruptcy laws, is consistent with, and does not disserve, the Commission's own policies and the matters that are committed to our responsibility and jurisdiction.

45. For similar reasons, we think a permanent, rather than a temporary, waiver is justified in this case. In circumstances in which a waiver is based on factual issues, such as those supporting the first three waiver standards, the Commission's general policy is to grant temporary waivers. *See Metromedia Radio & Television, Inc.*, 59 R.R. 2d 1196 (1985), *aff'd Health & Medicine Policy Research Group v. FCC*, 807 F.2d 1038 (D.C. Cir. 1986); *see also Crosby N. Boyd*, 57 F.C.C. 2d 475 (1976).[32] We have not specifically addressed the range of "special circumstances" in which a permanent waiver might be granted under the fourth waiver category.[33] In this particular instance, we conclude that a permanent waiver is justified. Murdoch has stated that unless a permanent waiver is authorized, he does not intend to pursue his bid for the *Post* in the bankruptcy proceeding. Further, he has offered persuasive reasons why, as a matter of business judgment, that position is reasonable. As Fox notes, a permanent waiver is an indispensable vehicle for effectuating a long-term stratagem for the *Post*'s survival and enables Murdoch to negotiate with the labor unions, suppliers, distributors and other creditors.[34] In addition, whether or not there may be other

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Kalikow's response, that he sought a purchaser willing only to assume the *Post*'s liabilities, confirmed by VS&A as consistent with the newspaper's value, satisfies the rationale behind our request for that information: to demonstrate that good faith efforts were made to dispose of the newspaper.

[26] In an apparent attempt to demonstrate that Kalikow rejected offers from those who would comply with the cross-ownership rule, Caucus attaches a letter purportedly sent to Zuckerman, the current owner of the *Daily News*, from Richard Emery, who claims to have had "direct discussions" with Kalikow on Zuckerman's behalf. Emery's letter indicates his attempts to obtain financial data which, it claims, Kalikow was "apparently providing to other prospective purchasers of the *Post*." In response, Kalikow states that he repeatedly requested, but never received, validation of Emery's agency relationship with Zuckerman. In fact, Kalikow notes, at all times he now claims to have represented Zuckerman, Emery was the attorney of record of Peter Hamill, a former editor of the *Post*. Zuckerman, in a separate letter to the Commission, confirms that Emery acted as his agent, but does not say that that relationship was ever made known to Kalikow. That Kalikow refused to provide specific financial information to an agent of an uncertain principal does not constitute an unwillingness to transfer the newspaper to a party in compliance with Commission rules. We also find it persuasive that Kalikow, as owner of the *Post*, even if he believed Emery represented Zuckerman, would be hesitant to disclose financial details to Zuckerman, owner of a competing New York City daily newspaper, who had not, according to Kalikow, "given any reason to believe" that he wanted the information in connection with a *bona fide* offer.

[27] Kalikow's efforts were catalogued in two letters addressed to Chairman Quello and placed in the record in this proceeding. We view them as representations to the Commission based on Kalikow's personal knowledge. There is no requirement, as some commenters suggest, that the Commission must disregard such facts unless presented in a sworn affidavit. *See, e.g.*, 47 C.F.R. §§1.2, 1.41 (1992).

[28] NAACP, asserting that Murdoch may intend to acquire the *Post* only to terminate its publication so that it may obtain the newspaper's real estate, maintains we should compel Murdoch to produce his business plan for the *Post*. Any concerns regarding Murdoch's blueprint for the *Post*'s future should be assuaged in that confirmation of a proposed plan of reorganization, under the Bankruptcy Code, can go forward only if the plan "has been proposed in good faith," 11 U.S.C. §1129(a)(3), and meets the feasibility requirement, that it "is not likely to be followed by the liquidation, or the need for further financial reorganization. . . unless such liquidation or reorganization is proposed in the plan." 11 U.S.C. §1129(a)(11). In this regard, we proceed on the assumption that Fox will carry out its repeated representations that Murdoch seeks to "salvage the newspaper," "repair the damage," "resuscitate a newspaper that was on the brink of failure," and "implement its plan to save a major daily newspaper." *See News International PLC*, 97 F.C.C. 2d 349, 356 (1984)("[I]t is not appropriate to infer, in the absence of information to the contrary" that [an applicant] will not faithfully carry out its representations [as to future conduct]. . . .").

[29] *Second Report and Order* at 1076 n.24; *see also Health & Medicine Policy Research Group v. FCC*, 807 F.2d 1038, 1044 (D.C. Cir. 1987), where the court of appeals noted, in reviewing an earlier waiver grant, the Commission's "expressed grave concern lest [its] cross-ownership rule misguidedly sound a newspaper's death knell."

[30] *See* the information submitted by VS & A, discussed *supra*, noting that expertise in the newspaper business is required to stabilize the staffing situation, attract readers and advertisers, and deal effectively with the trade unions; *see also*, note 8, *supra*, indicating that Champion has rescinded its bid for the *Post*.

[31] In paragraphs 46-51, *infra*, we expressly conclude that a waiver would not seriously endanger the diversity and competition aims underlying the rule. We emphasize, moreover, that waiver here is not based simply on the state of the New York market but also on our responsibility to accommodate, if possible, other federal policies and on the other factors discussed herein.

[32] *Crosby Boyd*, although also based upon the fourth waiver category, did not involve a bankrupt media outlet. Thus, that case is distinguishable in that the facts did not call upon our duty to harmonize, to the extent possible, our rules with other federal policies.

[33] *But cf. Field Communications Corp.*, 65 F.C.C. 2d 959 (1977), granting permanent waiver due to "special circumstances."

[34] NAACP contends that these reasons for seeking a permanent waiver, without further specific information, such as the nor-

viable bidders for the *Post*, it is evident from the record that the field of acceptable purchasers is extremely limited. Accordingly, if Murdoch withdraws his bid, the bankruptcy court could well be left with few, and perhaps no, viable offers to consider. In addition, that result would be inconsistent with our independent interest in ensuring that our rules are not enforced in a manner that jeopardizes the survival of a newspaper. In these special circumstances, we think that a permanent waiver should be authorized to enable the court to carry out its responsibilities. Grant of a permanent waiver will avoid an unnecessary encumbrance on the court's ability to transfer the station to Murdoch if the court concludes that Murdoch is the only viable buyer. And, as indicated below, a waiver in this instance is unlikely to have a significant impact on our diversity and competition concerns underlying the cross-ownership rule. Therefore, our efforts in this case to accommodate the federal policies underlying the bankruptcy laws by authorizing a permanent waiver are particularly appropriate.

46. The final scrutiny of our analysis under the fourth category, as noted above, requires that the requester demonstrate, "for whatever reason," that purposes of the broadcast-newspaper cross-ownership rule would be disserved by its strict enforcement. *Second Report and Order*, 50 F.C.C. 2d at 1085. Of the two fundamental principles of the rule, diversity of viewpoint and economic competition, diversity is controlling, so long as it is measured "in terms of providing the best practicable service to the American public," *id.* at 1074, a goal to which the Commission has always accorded weight and which has been8 ""specifically approved" by the Supreme Court. *FCC v. NCCB*, 436 U.S. at 803-804, 810 (*citing FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940)).

47. In examining the diversity of viewpoints in the case before us, we focus upon those media voices available in the city of New York which are responsive to the local problems and needs of the residents there.[35] *Second Report and Order*, 50 F.C.C. 2d at 1080-84; *Second Report and Order Recon.*, 53 F.C.C. 2d at 598. Our diversification policy, as we noted in fashioning the cross-ownership rule, evolved primarily from the First Amendment cornerstone that the "widest possible dissemination of information from diverse and antagonistic sources" is essential to the welfare of the public. *Second Report and Order*, 50 F.C.C. 2d at 1050 (*quoting Associated Press v. United States*, 326 U.S. 1, 20 (1945)). New York City itself is encompassed by the city-grade signals of at least 10 full-power television stations other than WNYW and it is the community of license of 24 AM and FM radio stations. Eight cable systems serve the five boroughs of New York City, providing between 28 and 78 channels. And New York, which has four general interest daily newspapers, is the only city in the nation to support more than two dailies. Moreover, 22 weekly newspapers, many of which cater primarily to local news, are published in the city.[36]

48. Given the wide array of voices in New York City, any detriment to diversity caused by common ownership of the two media outlets would be negligible, even if we look only to its full-service television stations and four dailies.[37] Indeed, Murdoch's potential for amassing an undue amount of control in the marketplace of ideas is unlikely in that the *Post*, according to VS&A, serves merely as a "second read" for most people: more than 80 percent of the *Post*'s readers also rely upon another daily for their news.

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mal length of labor union and supplier contracts, leaves the Commission with no "rational basis" for concluding that a permanent, rather than a temporary, waiver is necessary or appropriate. Moreover, NAACP argues, because the *Post* creditors are "amply protected" by the reportedly" $15 million value of the newspaper's building, the *Post* will become "a going concern in a reasonable time." We are persuaded that a permanent waiver is warranted, based upon the *Post*'s history of financial losses and the Creditors' assertion that what the newspaper needs, "and needs desperately, is financial stability." According to the Creditors, only then can management address severe operating losses, ameliorate employee morale and reverse declining circulation and advertising trends. We note, additionally, that the *Post*'s building, which is the personal property of Kalikow and not of the New York Post Co., according to Fox, is encumbered by a $25 million mortgage, an amount greater than the value NAACP assigns to that real property.

[35] In determining which existing broadcast-newspaper combinations necessitated divestiture, the Commission calculated only the number of daily newspapers and either the television or radio services within a locale. *Second Report and Order*, 50 F.C.C. 2d at 1083-84, the method Fleischman urges us to utilize here. In promulgating the rule, however, the Commission indicated greater flexibility would be utilized in evaluating a waiver request predicated on the fourth waiver category, the standard which implicates diversity and the concomitant number-of-voices analysis. *Id.* at 1085 n.47 ("Among others that parties may wish to bring to our attention are local access or origination on the community's cable television system or other special circumstances they think have a bearing on the appropriateness of granting waiver."); *see also Second Report and Order Recon.*, 53 F.C.C. 2d at 598 ("To the extent that these or any other matters [pertaining to the number of voices] demonstrate that the situation in a particular area so differs from the norm so as to arguably support waiver on that basis, parties are free to so allege."). Further, we believe that in the context of a new ownership pattern, as opposed to one involving forced divestiture of an "egregious" situation, for which the standard was devised, reliance on only television stations and daily newspapers would be unnecessarily rigid. Yet, we emphasize that our reliance on the diversity in New York, however measured, is not the sole basis in this case for our decision to grant permanent waiver.

[36] We need not, as Fleischman argues, compare the number of television stations and newspapers available in New York City in 1975, when the rule was adopted, with those available today in order that we not "relitigate resolved issues," an admonition of *Second Report and Order*, 50 F.C.C. 2d at 1085. We note that "resolved issues" referred not to the number of voices in a specific community in 1975 but to "basic premises," such as the Commission's decision to employ encompassment by a city-grade signal, in lieu of a Grade A or Grade B contour. *Second Report and Order Recon.*, 53 F.C.C. 2d at 593-94. Thus, a comparison of the New York media market in 1975 with that of today is not' controlling in our analysis of the fourth waiver category, whether, "for whatever reason," the purposes of the rule would be disserved by its application to a particular situation. *Second Report and Order*, 50 F.C.C. 2d at 1085. What we do rely upon, however, is the composition of the relevant market and how diversity in that market might be affected by the merger proposal before us in conjunction with the "special circumstances" discussed above.

[37] Fleischman's assertion that grant of Fox's waiver would carve out an exemption of the cross-ownership rule for the New York market is incorrect. Indeed, with regard to diversity concerns, we view the number of voices present in the market at the time the proposal is submitted as only one factor in our analysis.

49. Any cost to diversity in the New York market, however, will be outweighed by preservation of the *Post*, whose bankrupt status threatens the very existence of an alternative media voice. Such an eventuality would undermine the fundamental objective of the cross-ownership rule, founded on First Amendment principles, of promoting the widest dissemination of information and of expanding the marketplace of ideas. Indeed, the rule, predicated upon the presumption that the creation of a new television-newspaper combination "raises a problem" as to diversity, was not intended to result in the net loss of a media outlet. *Second Report and Order*, 50 F.C.C. 2d at 1077.

50. As to the rule's twin purpose, that of economic competition, we may consider antitrust policies in making public interest determinations. *FCC v. NCCB*, 436 U.S. at 795-96 (*citing United States v. Radio Corp. of America*, 358 U.S. 334, 351 (1959); *National Broadcasting Co. v. United States*, 319 U.S. 190, 222-224 (1943), but we are not empowered to enforce the antitrust laws. Here, we are confronted with the potential common ownership of WNYW, whose advertising revenues of $151.7 million comprise less than five percent of the $3.1 billion LNA assigns to the New York market,[38] and of the *Post*, whose advertising revenue of $32.8 million in 1992 comprise one percent of that market.[39] We believe that a one-percent augmentation in Murdoch's already five percent share of the New York market, defined by LNA as only a fraction of the media outlets available there, does not endanger Commission policy of preventing undue concentration of economic power.[40]

51. It is noteworthy that antitrust implications of the potential common ownership of WNYW and the *Post* do not terminate with this proceeding.[41] Pursuant)to the Clayton Act,[42] the Department of Justice and the Federal Trade Commission, which generally have primary jurisdiction with regard to antitrust concerns in most major mergers and acquisitions, may ultimately pass upon the proposed purchase of the *Post*, if Murdoch is selected by the bankruptcy court, to determine if it may go forward.[43] Additionally, allegations of undue concentration of ownership, supported by an adjudication of economic monopolization in violation of the Sherman Act[44] under changed market conditions,[45] as well as those regarding specific abuses under common ownership,[46] also specifically supported, can

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[38] NAACP contends that the New York market should be defined in terms of the number of readers and viewers rather than advertising revenues. However, because such revenues are a function of circulation and viewership, we believe the amount of advertising is a sound basis for analyzing market share.

[39] NAACP indicates that the one percent attributed to the *Post* may be greater in that the daily, according to the newspaper's publisher, Patrick Purcell, suffered a steep decline in paid advertising after the "circulation scandal" of August 1992. During the "biggest" advertising period of the year,'&Purcell states, "the *Post* was forced to give away pages." Although we do not attempt here to numerically define the maximum allowable market share under our public interest standard, we note that an applicant's media holdings must "be viewed functionally in the context of the particular market involved, its structure, history and probable future." *Stauffer Publications, Inc.*, 59 F.C.C. 2d 836, 847 (1976) (*quoting U.S. v. Continental Can Co.*, 378 U.S. 441, 458 (1964)). In the case before us, the New York media market has neither a history of, nor indicated a trend toward, concentration. And even assuming the *Post*'s normal advertising revenues would have been twice the $32.8 million LNA claims, or even three times that amount, we still would conclude that our goal of preventing undue concentration of economic power in the New York market would not be disserved by common ownership.

[40] NAACP asserts that Murdoch's current ownership of *TV Guide*, which, it alleges, is the second largest circulated periodical in the market, has "serious implications" for Murdoch's media influence. Yet, NAACP provides no specific support for that premise. In contrast, the advertising market presented by Fox, as described by William Shew of Arthur Andersen Economic Consulting, is predicated only upon commercial television, commercial radio, daily newspaper and outdoor advertising in the New York ADI, and omits all periodicals, which would, if included, dilute the perceived strength of *TV Guide*. We have no factual basis, therefore, for believing that *TV Guide* garners a percentage of the market substantial enough to trigger anticompetitive concerns. Indeed, upon Murdoch's acquisition of *TV Guide*, the Department of Justice and the Federal Trade Commission had the opportunity to prevent the sale if they believed Murdoch was amassing an undue amount of economic control, but declined to do so. Nor has the Department of Justice intervened in the proceeding before us.

[41] Caucus refers to two civil lawsuits filed against Fox, one involving allegations that Fox and its television station, KTTV-TV, Los Angeles, California, unlawfully scheduled Fox Film advertisements and the other, brought by the Disney Company, involving allegations of antitrust violations by Fox and other Murdoch companies, to argue that Fox "is hardly the ideal candidate for a *permanent* waiver of a rule that is designed to be the FCC's major bulwark against anti-competitive activity." However, both suits ended in settlement, and settlement agreements, like consent decrees, do not constitute "adjudicated misconduct" and are, therefore, not probative of an applicant's character, even though they involve broadcast-related businesses. *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 F.C.C. 2d 1179, 1201, 1205 (1986), *on recon.*, 1 F.C.C. Rcd 421 (1986), *appeal dismissed sub nom. National Association for Better Broadcasting v. FCC*, No. 86-1179 (D.C. Cir. 1987); *see also Policy Regarding Character Qualifications in Broadcast Licensing*, 5 F.C.C. Rcd 3252 (1990), *recon. denied*, 6 F.C.C. Rcd 3448, 3448-49 (1991), *further recon.'(pending.*

[42] 15 U.S.C. §18a.

[43] Although, as Caucus indicates, the Department of Justice intervened in the rule making proceeding in support of implementation of the broadcast-newspaper cross-ownership rule, *Further Notice of Proposed Rule Making in Docket No. 18110*, 22 F.C.C. 2d 339, 344 (1970), it has expressed no objection to the permanent waiver request now before us. Commenters and other parties are free, of course, to present their arguments regarding economic concentration to the Department of Justice.

[44] Section 1 of the Sherman Act, 15 U.S.C. §1, forbids contracts or conspiracies in restraint of trade or commerce, and Section 2, 15 U.S.C. §2, addresses the actions of single firms that monopolize or attempt to monopolize, as well as conspiracies and combinations to monopolize.

[45] That is not to say, however, that we will actually determine whether antitrust laws have been violated. Those are matters for the Department of Justice. *Cahill and Kaswell*, 37 R.R. 2d 197, 199 (1976).

[46] Examples of specific abuse include preferential treatment received by a station in the commonly owned newspaper, such as out-of-sequence listing of the television station's programming, *Newhouse Broadcasting Corp.*, 73 F.C.C. 2d 186, 190-191 (1979), or the "consistent featuring" by text or photograph in the newspaper of the co-owned television station's programming, *WGAL-Television, Inc.*, 62 F.C.C. 2d 527, 531-32 (1976), and licensee conduct resulting in artificially established prices for local advertising. *KSL, Inc.*, 39 R.R. 2d 249, 253 (1976). Specific allegations of abuse, however, will be designated for hearing "only if the abuse was so detrimental to the public or to the licensee's competitors that when balanced against the degree

be considered in WNYW's renewal proceeding. *Second Report and Order*, 50 F.C.C. 2d at 1080 n.29, 1088. Such review should provide an adequate deterrent to the potential for abuses of common ownership.[47] Accordingly, we decline commenters' suggestions as to further behavioral safeguards.[48] Having assessed the New York City market, as well as the particular circumstances involved in this request, we believe that Murdoch's common ownership comports with our dual goals of diversity and economic competition.

52. In conclusion, although this is the first time we have been faced with a sufficiently persuasive case to grant a permanent waiver of our cross-ownership rule for the creation of a "new" broadcast-newspaper combination under existing waiver criteria,[49] we find that Fox has amply justified its request, 1comporting with the high burden necessary to warrant grant of a waiver of such duration. In light of the limited field of potential purchasers of the insolvent newspaper, we believe that grant of a permanent waiver does not disserve our policies and concomitantly accommodates bankruptcy law policies -- equality of distribution among creditors, a fresh start for debtors, and the efficient and economical administration of cases--by ensuring that that field is not unduly diminished. We note, however, our grant today is personal to Murdoch and News Corp., as controlling entities of both WNYW and, possibly, the *Post*. Consequently, waiver of the cross-ownership rule terminates upon a long-form transfer of control of either entity or assignment of either media outlet.

53. NAACP's suggestion that Murdoch hold the *Post* for a one-and-a-half-year period in what would be essentially a caretaker capacity, with the singular aim of reviving the paper until a minority-controlled entity has arranged financing,[50] finds no support in either our minority ownership policies or the cross-ownership rule.[51] Although we have implemented policies to encourage licensees to sell to minority-controlled businesses, such as those cited by NAACP, *Minority Ownership in Broadcasting*, 92 F.C.C. 2d 849 (1982), and *Report on Minority Ownership in the Broadcasting Industry*, F.C.C. Office of Public Affairs (1978), we have never adopted a policy that would mandate such sales. Moreover, we have no jurisdiction over the employment practices of newspapers,[52] and, as stated previously, bankruptcy court is the forum in which purported04purchasers, minority-controlled or otherwise, should now present their proposals.

54. Similarly, we cannot deny grant of a waiver based on allegations, even if true, that Murdoch will practice, as he purportedly did under his former ownership of the *Post*, racist and inflammatory journalism. That is because we are proscribed from interfering with a newspaper's exercise of freedom of expression. *Near v. Minnesota*, 283 U.S. 697

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of media concentration a substantial and material question is raised whether continued license renewal would be in the public interest." *KHQ, Inc.*, 87 F.C.C. 2d 705, 713 (1981).

[47] Caucus, Fulani and one letter-writer allege that the competitive advantages common ownership yield have been, as Fulani states, "blatantly displayed" since Murdoch's assumption of control of the *Post* in late March: on', April 5, the newspaper featured a page-three "Post Exclusive," a promotion for that evening's edition of "A Current Affair," a Fox program to have been aired on WNYW; and on April 23, the *Post* ran five "plugs" for WNYW and Fox in page-six and -seven feature stories or columns. However, six references to a commonly owned media outlet do not amount to abuse, particularly where there is no indication that the same would not have occurred were the two media separately owned.

[48] Caucus points to then-Commissioner Quello's separate statement, at the time the cross-ownership rule was adopted, that the Commission require operational separation of a commonly owned broadcast station and daily newspaper. We note, however, that Commissioner Quello argued, in the alternative, for "extreme vigilance on a case-by-case basis." The ability of interested parties to bring evidence of any misconduct arising from the common ownership of WNYW and the *Post* to the Commission's attention at renewal time, as well as Fox's obligation under Section 1.65(c) of the Commission's Rules to disclose any adverse adjudications bearing upon its character qualifications, provide such oversight.

[49] Indeed, we note that while NAACP is correct in its contention that "the normal time period" for past Commission waiver grants has been 18 months to three years, in virtually every past cross-ownership waiver case, all of which involved new combinations, we actually granted the duration of time the applicants requested. *E.g., The Evening News Association*, 102 F.C.C. 2d 1263, 1265 n.2 (1986)(request of a divestiture deadline of October 1, 1989 granted); *Metromedia Radio & Television, Inc.*, 102 F.C.C. 2d 1334, 1337 (1986)(request of two years granted); *Twentieth Holdings, Inc.*, 1 F.C.C. Rcd 1201 (1986)(request of 18 months granted); *Golden West Associates, L.P.*, 59 R.R. 2d 125, 127 (1985)(request of 18 months granted); *Stauffer Publications, Inc.*, 66 F.C.C. 2d 653, 654 (1977)(request of three years granted), *but cf., Twentieth Holdings Corp.*, 4 F.C.C. Rcd 4052 (1989)(request for approval of permanent insulated trust as grounds for new combination granted with conditions); *Owosso Broadcasting Co.*, 60 R.R. 2d 99 (1986)(alternative request by "egregious" newspaper-AM-FM combination, operating under the divestiture order in *Second Report and Order*, for waiver until March 1, 1987 granted in lieu of indefinite stay).

In contrast, Fox has requested neither Commission approval of a temporary insulated trust, as it did for its Boston media outlets in *Twentieth Holdings, Inc.*, 1 F.C.C. Rcd 1201 (1986), or a temporary waiver, as NAACP would prefer we grant here today. Instead, Fox seeks a permanent waiver for a new combination. Thus, we emphasize here, as we stated in *Washington Star*, 54 F.C.C. 2d at 675-076, "|t|hat other courses of action might be available, that other measures might be possible, and that other media interests might be disposable, may be matters properly the subject of our scrutiny. Here, however, our primary concern lies with the alternative chosen by the licensee. ." That no applicant since *Washington Star* has formally requested a permanent waiver apparently demonstrates the perceived inability of potential applicants to bear the requisite heavy burden rather than, as Caucus surmises, the "perceived unavailability of such extraordinary relief."

[50] *Salt City Communications, Inc.*, 8 F.C.C. Rcd 683, 686 n.15 (1993), invoked by NAACP in this regard, does not support its proposition. In that case we held only that an applicant's reliance on a properly organized and experienced minority enterprise small business investment company, or MESBIC, constitutes reasonable assurance of financial qualification, an issue not present here.

[51] It is noteworthy, for example, that the Commission considered and rejected a proposed requirement that ownership of any divested station under the cross-ownership rule should pass to minority group control. *See Second Report and Order*, 50 F.C.C. 2d at 1086.

[52] We have no regulatory power, contrary to the belief of some commenters, with regard to employment practices at the *Post* or at any commonly owned newspaper. Thus, it is inappropriate for NAACP, citing *Gulf Dunes Broadcasting, Inc.*, 7 F.C.C. Rcd 1593 (1992), to analogize Kalikow's possible transfer of the *Post* to the transfer of a television station in which we may compel transferees to implement certain EEO reporting conditions.

(1931).[53] Even if such allegations were directed at WNYW, a broadcast station over whose content we do have a limited role, *see, e.g., FCC v. Pacifica Foundation*, 438 U.S. 726, 747 (1978), both the First Amendment and Section 326 of the Act forbid us from censoring subject matter and opinions relating to religious beliefs, race or national background, regardless of how offensive they may be. *e.g., Thaddeus L. Kowalski*, 46 F.C.C. 2d 124 (1974), *aff'd sub nom. Polish American Congress v. FCC*, 520 F.2d 1248 (7th Cir. 1975), *cert. denied*, 424 U.S. 927 (1976), and from curbing expression, outside narrowly defined classes of speech, such as indecency, that does not involve "a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." *Anti-Defamation League of B Nai B rith*, 4 F.C.C. 2d 190, 191 (1966), *aff'd*, 403 F.2d 169 (D.C. Cir. 1968), *cert. denied*, 394 U.S. 930 (1969)(*quoting Terminiello v. Chicago*, 337 U.S. 1, 4 (1949); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)).

55. Finally, our decision here today is consistent with the Congressional directive that the Commission refrain from the use of appropriations "to repeal, to retroactively apply changes in, or to begin or continue a reexamination of the rules and the policies established to administer" the broadcast-newspaper cross-ownership rule. Waivers for new television-daily newspaper combinations, "in the event that in a particular case our approach could be unduly harsh," were contemplated from the time of the rule's adoption. *Second Report and Order*, 50 F.C.C. 2d at 1077. Our action today, with regard to a case of first impression, reflects adherence to the standards originally developed for evaluation of waiver requests and provides the requisite "safety valve procedure for consideration of an application for exemption based on special circumstances." *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). And contrary to NAACP's assertion, the policies underlying the cross-ownership rule are not contravened by virtue of our grant of a waiver, because "|t|he very essence of waiver is the assumed validity of the general rule, and also the applicant's violation unless waiver is granted." *Id.* at 1158.[54] Indeed, in upholding the cross-ownership rule, the6Supreme Court found that its "reasonableness" as a means of achieving diversification is "underscored by the fact that waivers are potentially available from both the prospective and the divestiture rules. . . ." *FCC v. NCCB*, 436 U.S. at 802 n.20.7[55]

56. Because there are no substantial and material issues of fact to be resolved regarding Fox's compliance with the fourth waiver category, an evidentiary hearing is not warranted. [56] *See Second Report and Order*, 50 F.C.C. 2d at 1086 ("There is no requirement for the holding of an evidentiary hearing imposed by law absent the raising of substantial factual issues and we shall not take on a pointless task."); *see also* 47 U.S.C. §309(e)(hearing required only when there is a substantial and material question of fact or the Commission is unable to make the finding specified).[57]

57. Accordingly, in the event the bankruptcy court, the final decision-maker with regard to the *Post*'s disposition, does, in fact, approve Murdoch as the newspaper's new owner, we find that it is in the public interest to waive the cross-ownership rule in order that Murdoch may indefinitely control both the *Post* and WNYW. In this regard, as discussed below, we find that allegations of misrepresentation and EEO violations against Fox are groundless and present no impediment.

MISREPRESENTATION

58. *Pleadings*. In its Request to Specify Misrepresentation Issues Against Murdoch and Fox, filed May 6, 1993 (Request to Specify), Caucus alleges that Fox made two misrepresentations of material fact to the Commission regarding its waiver request.[58] According to Caucus, the

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[53] Nor, as one letter-writer requests, can we compel Murdoch to publish, as a *quid pro quo* for grant of the waiver, a full page of letters to the editor each day. *See, e.g. Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974).

[54] NAACP, citing *Northeast Cellular Telephone Company, L.P. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990), argues that policy is inherently implicated with the decision to waive the rule. The court in that case remanded our grant of a waiver where, it held, the Commission did not articulate "any standard by which |the court| can determine the policy underlying its waiver." *Id.* at 1166. In the case before us, however, the waiver standard was cast at the time of the rule's adoption and we are acting in accord with the *Northeast Cellular* court's'5instruction: granting waiver "only pursuant to a relevant standard . . . |which is| best expressed in a rule that obviates discriminatory approaches." *Id.* (*quoting WAIT Radio v. FCC*, 418 F.2d at 1159).

[55] Thus, the contention of Fleischman and NAACP, that Commission grant of a waiver here triggers the rule making guidelines of Section 553 of the Administrative Procedure Act, is misplaced.

[56] Caucus appears to suggest that the Commission must order an evidentiary hearing in this case because the proposed cross-ownership is "voluntary." To support this proposition, Caucus cites *Washington Star*, 54 F.C.C. 2d at 675, where the Commission ordered a hearing because of what Caucus characterizes as the "voluntary decision of the licensee to seek to retain the broadcast properties and the newspaper." But the cited reference in *Washington Star* is a different context. There, the Commission was merely disaffirming the applicant's suggestion that the transaction was exempt from the rule because the proposed transfer was "not a truly voluntary action," but was instead precipitated by the financial problems besetting the *Star-News*. *Id.* at 673. Yet, we held in that case, as we do here, that the cross-ownership rule applies to situations involving severe economic distress and bankruptcy, but that waiver may be had if appropriate. *See id.* at 675.

Moreover, this case is distinguishable from *Washington Star*, a case in which the Commission designated for hearing the issue of whether a permanent waiver should be granted under the first waiver standard, because the applicant had not made a sufficient factual showing of inability to find another buyer for the *Star-News*. In contrast, we have sufficient facts before us here to grant a waiver under the fourth standard.

[57] We also reject Caucus' request that the Commission itself hold a two-hour oral argument on the subject of granting Fox a waiver request. In marked contrast to *ABC-ITT Merger*, 7 F.C.C. Rcd 245 (1967), a case Caucus cites in support of its request for oral argument and in which there were no adversary parties, *id.* at 247, the bulk of the record before us contains adversarial comments regarding fact and law. The procedure employed in this proceeding, inviting and permitting intervention without a showing of standing or interest, has yielded a fully developed record, comprising more than 350 pages of'8pleadings, nearly half that amount of exhibits, and dozens of letters, upon which we are able to reach a reasoned decision.

[58] As an additional matter, NAACP also seeks the designation of issues against Fox. The NAACP asserts that Fox made untrue

Commission should therefore designate issues to determine whether Fox is "basically qualified" to receive a waiver.[59] Request to Specify at 2, 17-18. Additionally, Caucus suggests that the Commission should designate the license of WNYW for an early renewal hearing.[60]

59. Caucus first asserts that Fox falsely told the Commission, in its waiver request, that it was imperative that the Commission act by June 1, 1993, because the interim management agreement had a termination date of June 1. Caucus accuses Fox of concealing the fact that the management agreement actually provided for a 30-day extension, until July 1, and that Murdoch had already informed the bankruptcy court that the management agreement would be extended 30 days if necessary to obtain a grant of the waiver request. Caucus contends that Fox's alleged misrepresentation was intended to pressure the Commission into hasty action on the waiver request by exaggerating the danger that delayed action would lead to the collapse of the *Post*.

60. Caucus next asserts that Fox misrepresented to the Commission that News Corp. was the only serious potential purchaser of the *Post*. Caucus claims that the circumstances detailed at paragraphs 29-30, above, establish that Champion has been a serious bidder for the *Post* since at least March 19, 1993, and that Champion would probably have acquired the *Post* except for Murdoch's preemptive involvement. According to Caucus, despite Murdoch's involvement, Champion has indicated a continued willingness to purchase the *Post*. Additionally, Caucus asserts that there are other potential purchasers of the *Post*, including media owner, Mortimer Zuckerman.[61]

61. Fox denies that it misrepresented any material facts to the Commission. Fox accuses Caucus' attorney of pursuing a pattern of baseless allegations against Fox.

62. Fox maintains that it did not mislead the Commission in urging expeditious action on the waiver request. Fox asserts that it accurately told the Commission in the waiver request that Murdoch had agreed to manage and provide financing to *Post* until "at least June 1, 1993." Request for Waiver at 7. Fox also observes that shortly after filing the waiver request it submitted a copy of the management agreement (which set forth the termination and extension provisions) and the bankruptcy court order approving it, on April 12, 1993. Fox asserts that it never represented that June 1, 1993 was a court-imposed (as opposed to contractual) deadline and contends that it always made clear that it was merely attempting to limit the extreme burden of managing the *Post* on an interim basis. Moreover, Fox rejects the suggestion that it sought to pressure the Commission into making an inappropriate decision.

63. Fox also maintains that its statements regarding other potential purchasers were not misleading. Fox denies that it claimed that Murdoch was the only potential purchaser of the *Post*. Rather, Fox insists that it argued only that purchase by Murdoch was the only "viable" plan for saving the *Post*.[62]

64. Fox accuses Caucus of exaggerating Champion's status as a potential purchaser of the *Post*. Fox submits an analysis of Champion's proposal by VS&A, which concludes that Champion lacks both the experience and a realistic financial plan to operate the *Post*. The Creditors similarly note that Champion's proposal was deficient.

65. Fox also takes issue with Caucus' description of Champion's activities and disclaims the suggestion that Fox must have known about them. Fox explains that although Champion's attorney appeared at the March 19, 1993 hearing session: (1) Champion was not identified as the party being represented; (2) the bankruptcy judge declined to take up Champion's proposal; and (3) no $1 million check was presented to the judge. According to Fox, News Corp.'s general counsel, Siskind, was told by Peter Faris, a *Post* vice president, of Champion's interest in acquiring the *Post* but was also told that, as of March 24, 1993, Faris believed that Champion was no longer interested. Fox points out that Champion did not appear at subsequent sessions of the bankruptcy court[63] and denies that Fox had any contemporaneous knowledge of Champion's memorandum of understanding. In any event, Fox asserts that the memorandum of understanding reflected no real agreement between Champion and the *Post* and that Champion's proposal was rejected by the creditors' committee. Fox submits statements by Kalikow, explaining why he did not deal with Mortimer Zuckerman and others.

66. *Discussion*. Although Section 309(d) of the Communications Act, 47 U.S.C. § 309(d) does not technically apply to a waiver proceeding or a request to call up an early renewal application, we have nevertheless examined Caucus' allegations and Fox's responses under the Section 309(d) standards for designating a hearing issue in connection with a pending application. *See Astroline Communications Company Limited Partnership v. FCC*, 857 F.2d 1556, 1561-62 (D.C. Cir. 1988). We find that the totality of the evidence before us does not raise a substantial and material question of fact that would justify further inquiry. Our focus is a narrow one: whether, on the basis of the plead-

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statements to the Commission and that Fox used statements supporting the waiver request to argue that the Commission should grant a permanent waiver, when the individuals who made the statements did not advocate that the waiver should be permanent. We find no *prima facie* basis in these allegations to conclude that Fox committed serious misconduct. The NAACP expressly declines to assert that the allegedly untrue statements were intentional misrepresentations. Petition to Deny, filed May 10, 1993, at 8. Moreover, while the NAACP observes that the statements supporting the waiver do not distinguish between a permanent or temporary waiver, this does not establish that the statements were fabricated, fraudulently obtained, or otherwise irregular.

[59] We understand this as an assertion that Fox seeks a waiver with "unclean hands." *See WKAT, Inc. v. FCC*, 296 F.2d 375, 383 (D.C. Cir. 1961).

[60] Caucus contends that the misrepresentations alleged here should be considered in conjunction with alleged misconduct adjudicated in the comparative renewal proceeding involving Fox's station KTTV in Los Angeles, California. That proceeding has not, however, resulted in any finding that Fox committed disqualifying misconduct and is not yet ripe for consideration. *See Fox Television Stations, Inc.*, 8 FCC Rcd 2361 (Rev. Bd. 1993), *rev. pending*.

[61] Among other media interests, Zuckerman owns the *New York Daily News*.

[62] In this regard, other commenters seconded Fox's claim that Murdoch was the only viable purchaser. *See* Comments of Creditors at 2-4, 7-8.

[63] Champion claims that it was not aware of or invited to subsequent bankruptcy court conferences. Reply to Consolidated Reply Comments of Fox Television Stations, Inc. ("Fox") Dated May 17, 1993, filed May 25, 1993 by Champion (Champion Reply) at 8.

ings filed or other matters of which we may take official notice, the evidence arouses a sufficient doubt as to whether Fox intended a factual deception of the Commission to warrant further inquiry. *See Astroline*, 857 F.2d at 1561-62; *Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 ¶ 6 (1983).

67. With this in mind, we turn first to the representations Fox made in connection with its request that the Commission act by June 1, 1993. As outlined below, we find that the totality of the evidence raises no substantial and material question that Fox attempted to deceive the Commission, although some statements made by Fox in its waiver request, filed April 7, 1993, while technically accurate, are potentially misleading. For example, Fox stated without qualification: "|T|he management agreement approved by the Court has a termination date of June 1, 1993. . . . It is therefore imperative that the Commission act as expeditiously as possible and in any event prior to June 1, 1993." Waiver Request at 8. The statement that the management agreement has a June 1 termination date is literally true. However, it is not fully revealing since the management agreement also provided for a 30-day extension at Murdoch's sole discretion. Request to Specify, Appendix B at 5. Moreover, Siskind represented to the bankruptcy court, on March 25, 1993, that Murdoch was "prepared to extend that sixty-day period to ninety days if the extension is required to obtain the FCC waiver." *Id.*, Appendix A at Tr. 63. Thus, the claim that action by June 1 was "imperative" might be considered an overstatement. Similarly, Fox's characterization, without qualification, of June 1, 1993 as a "deadline" was potentially misleading for the same reason. Waiver Request at !17. In this regard, the Commission's public notice setting the period for public comment specifically noted that: "The termination date of the court-approved management agreement is June 1, 1993." *Public Notice*, note 1, above.

68. Other evidence, however, rebuts these inferences and indicates that there is no substantial and material question of deceptive intent. In contrast to the statements cited above, another statement in the waiver request plainly appears to contemplate the possibility of operation beyond June 1. Fox said: "under |the management agreement| NYP agreed to manage and provide financing to the newspaper until *at least* June 1, 1993." Waiver Request at 7 (Emphasis added.) This language underscores that although Fox urged the Commission in extreme terms to act by June 1, it did not conceal the fact that the "deadline" was self-imposed and thus subject to being extended, if Murdoch so desired.[64] Conversely, despite the extension provision, Murdoch was contractually obligated to manage the *Post* only through June 1. Thus, Fox could truthfully tell the Commission that there was a potential risk that Murdoch would abandon the *Post*, if as of June 1, it did not appear that favorable Commission action was likely. Under these circumstances, although Fox's language was intemperate, it did not materially distort the facts. Thus, there is no substantial and material question of intent to mislead.

69. As to Fox's representations regarding other potential purchasers of the *Post*, we find that most of statements made in this regard state simply that there are no other "viable" purchasers of the *Post*. For example, Fox stated: "|Operation by Murdoch| is the only viable way to preserve New York's fourth major daily printed voice." Waiver Request at 12. Whether a potential purchaser is "viable" is by its very nature a question of opinion, and, indeed, (*see* paragraph 38, above), we required Fox to make a detailed showing in support of this generalization. Thus, we find no *prima facie* question of misrepresentation based on such statements. In any event, our own review of the materials before us suggested that the question of Champion's viability was far from clear cut, and doubts about its proposal were borne out by subsequent events.[65] Thus there is no substantial and material question of fact regarding misrepresentation or lack of candor.

70. Two statements, however, are more troublesome. Fox represented that:

> . . . |N|o other potential purchaser came before the Bankruptcy Court to propose any interim plan to save the *New York Post*. Thus, no viable purchaser other than NYP has demonstrated a willingness to take on the enormous challenge and cost of stabilizing, much less revitalizing, the newspaper.

Waiver Request at 5. Similarly, Fox stated: "In fact, neither the Court nor any other party has been willing to step in and assume management responsibilities given the incredibly difficult circumstances present at the newspaper." Opposition to "Request to Modify Procedural Schedule," filed April 16, 1993, by Fox at 4. These statements are literally true since no other purchaser in fact presented an alternative plan to the bankruptcy court. However, they appear potentially misleading since, as set forth in paragraphs 29-30, above, Champion apparently attempted to come before the bankruptcy court on March 19, 1993[66] and demonstrate its willingness to purchase and manage the *Post* and thereafter pursued discussions with *Post* officials and the creditors' committee to perfect its proposal.[67]

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[64] As a collateral matter, there is no basis for Caucus' allegation that: "The Agreement provides for *a 30-day extension*, if necessary, A FACT NEVER DISCLOSED TO THE FCC." Request to Specify at 6 (Emphasis in the original.) It is not true that the extension was never disclosed. Fox submitted the agreement, which contains the termination provision, at the request of the Mass Media Bureau, shortly after filing the waiver request, before any oppositions were filed. *See* Letter from Hogan & Hartson to Barbara Kreisman (Chief, Video Services Division) (Apr. 12, 1993)

[65] *See, e.g.*, the analysis by VS&A, Consolidated Reply Comments, filed May 17, 1993, by Fox (Consolidated Reply), Appendix C. *See also* Comments of Creditors at 4-6 and the discussion below. *See* note 8, *supra*. In any event, we would not have had to resolve the question of Champion's viability in ruling on Fox's waiver request.

[66] The transcript of the bankruptcy hearing does not, however, support Caucus' statement that "Champion presented the bankruptcy judge with a certified $1,000,000 check at a March 19, 1993 hearing session as proof both of Champion's serious interest and its financial wherewithal." Request to Specify at 10. The transcript indicates that the judge did not take up the subject of Champion's proposal. Consolidated Reply, Appendix B., Exh. at Tr. 111.

[67] In this regard, the Commission's April 16, 1993 order directed Fox to provide a description of "efforts |subsequent to the newspaper's bankruptcy| by the bankruptcy court to dispose of the newspaper|.

71. The totality of the evidence before us, however, raises no substantial and material question that Fox knew of Champion's continuing efforts at the time it made these statements, and without such knowledge there could have been no intent to deceive. Siskind admits that *Post* vice president Faris discussed with him Champion's interest in the *Post*, between March 22-25, 1993, after Champion's attempted appearance at the March 19 bankruptcy hearing and before the filing of the waiver request. But both Siskind and Faris indicate that, prior to Fox's April 7 waiver request, Faris told Siskind that Champion would not pursue its interest in the *Post* and that Faris did not inform him of the memorandum of understanding. *Id.*, Appendix B at 3, Appendix F at 4.[68] Thus, in the context0of Fox's belief that Champion was no longer pursuing its interest, the above-quoted statements raise no substantial and material questions of fact suggesting an intent to deceive the Commission.

72. In addition, the evidence also does not support the contention that, subsequent to the discussions between Siskind and Faris, Fox would "presumably" have found out about Champion's proposal at the March 25 creditors' committee meeting. *See* Champion Reply at 8. Siskind acknowledges that the creditors' committee contained News Corp. representatives. Consolidated Reply, Appendix B at 4. However, Siskind states that those representatives were excluded from the March 25, 1993 meeting before Champion presented its proposal. *Id.*

73. Siskind's claim that, after he spoke to Faris, he was not informed of Champion's subsequent efforts to pursue its proposal is consistent with the evidence, which indicates that Champion was not successful in interesting either the *Post*'s management or the creditors' committee in its proposal.[69] In this regard, the evidence does not suggest that the memorandum of understanding reflected substantial interest on the part of the *Post*. Bumbaca, who executed the agreement on behalf of the *Post*, explained the circumstances of its execution. Bumbaca stated that, although he did not consider Champion's proposal realistic, he signed the memorandum of understanding only so that Champion would have the opportunity it wanted to present the proposal to the creditors' committee.[70] *Id.* Bumbaca explained that the memorandum did not reflect any negotiation between Champion and the *Post* and that Bumbaca did not discuss it with *Post* officials other than bankruptcy counsel, Marilyn Simon, who had instructed Bumbaca to cooperate with Champion.[71] Consolidated Reply, Appendix G at 1-3.

74. Similarly, the evidence indicates that Champion made no headway with the creditors' committee. *See generally* Comments of Creditors. A representative of the creditors' committee states that the committee notified Champion by telephone after the meeting that it did not find Champion's proposal to be the basis for serious negotiation and declined to accept Champion's $1 million check. *Id.* at 6, Exh. C. Champion admits that the creditors' committee has shown no interest in further negotiation with Champion. Champion Reply at 11. These circumstances do not suggest any reason that Fox would have been apprised of Champion's proposals either on the basis of Champion's subsequent contacts with the *Post* or with the creditors' committee.

75. Accordingly, we find no substantial and material questions of fact regarding misrepresentation or lack of candor.

EEO MATTERS

76. NBMC contends that neither WNYW nor the *Post* employ African-Americans in managerial or executive positions. Furthermore, NBMC contends, African-American employees at WNYW have filed employment discrimination complaints with the U.S. Equal Employment Opportunity Commission, violations, it claims, are sufficient to trigger a review of WNYW under Section 73.2080 of the Commission's Rules.

77. With regard to WNYW, Fox notes, 37.5 percent of its employees are minorities, 22.4 of which are African-Americans and 11.8 percent of which are Hispanic.[72] Of the top-four job categories at WNYW, Fox further states, 32.5 percent are held by minorities, of which 17.3 percent are African-Americans and 11.8 percent are Hispanics.

78. Generally, our review of a broadcast licensee's implementation of its EEO program occurs at renewal time or in connection with a license assignment or transfer of control application.[73] With respect to complaints filed with the EEOC, resolution of such matters are initially within the province of that agency pursuant to *Memorandum of*

[68] Faris stated that soon after the March 19 bankruptcy hearing he came to believe that Champion was not a viable buyer. He further stated that, on March 22, 1993, when he told Champion's owner, Wahba, that Murdoch was interested in bidding on the *Post*, Wahba said that he would step aside. Faris states that, based on several conversations with Wahba, he believed that Champion had ceased bidding on the *Post*. Faris states that, although he knew that Wahba intended to meet with *Post* official Bumbaca, he was not aware, at the time, that Bumbaca had signed a memorandum of understanding with Champion. Consolidated Reply, Appendix F at 2-5.

[69] As discussed at note 27, above, it is also apparent that there is no viable relationship between the *Post* and Zuckerman. Zuckerman and Kalikow disagree as to the reasons for the breakdown of their negotiations. Letter from Hogan & Hartson to The Secretary, FCC (Apr. 20, 1993); Request to Specify, Appendix M; Consolidated Reply, Appendix E; Letter from Mortimer B. Zuckerman to Chairman James H. Quello (May 20, 1993).

[70] As noted at paragraph 30, above, the memorandum of understanding states on its face that its provisions are contingent on evidence of authorization by the *Post* to become effective. Request to Specify, Appendix F.

[71] Kalikow, states that the reason he omitted Champion from a list of potential buyers, requested by the Commission and submitted on April 20, 1993, is that he had no contact with Champion. Consolidated Reply, Appendix E at 2. *See* Letter from Hogan & Hartson to The Secretary, FCC (Apr. 20, 1993). R

[72] The New York Metropolitan Statistical Area is approximately 48 percent minorities, 22.2 percent of which are African-American and 18.5 percent of which are Hispanic.

[73] Moreover, we have consistently stated that we will not look at individual job categories in assessing EEO performance. Rather, we look to a station's overall employment, including the upper level job categories as a group, not to specific managerial or executive positions, as NBMC would has us do. *Carolina Christian Broadcasting, Inc.*, 3 F.C.C. Rcd 1907, 1909 (1988).

Understanding Between the FCC and the EEOC, 70 F.C.C. 2d 2320, 2330 (1978). Under these circumstances, further consideration of these allegations is not warranted.[74]

CONCLUSION

79. We find that the commenters have failed to establish a substantial and material question of fact. Consequently, there is no need for a hearing under Section 309(d) of the Act. We also find that grant of Fox's request for waiver of Section 73.3555(d)(3) will serve the public interest.

80. Accordingly, IT IS ORDERED, that the comments objecting to Fox's request for a waiver of the broadcast-newspaper cross-ownership rule ARE DENIED. IT IS FURTHER ORDERED, THAT the Request to Specify Misrepresentation Issues Against Rupert Murdoch and Fox, filed May 6, 1993, by the Caucus for Media Diversity IS DENIED, and that Fox's request for waiver of Section 73.3555(d)(3) IS GRANTED, contingent upon the bankruptcy court's approval of Murdoch's bid or plan of reorganization.

81. The staff of the Mass Media Bureau is directed to send copies of this declaratory ruling to the parties filing formal comments by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[74] Employment practices of the newspaper are not relevant to the Commission's inquiry, and, in any event, the current minority employment profile at the *Post* is not attributable to Murdoch. Nevertheless, Fox indicates in response to NBMC's allegations, under Murdoch's ownership of the *Post*, from January 1, 1977 until 1987, total employment of minorities increased 250 percent, from 7.66 percent of the work force to 19.48 percent. And of the four editorial hires by Murdoch since assuming management in late March 1993, two, or 50 percent, were minorities.

Dissenting Statement
of
Commissioner Andrew C. Barrett

Re: Declaratory Ruling: Permanent Waiver of Broadcast-Newspaper Cross-Ownership Rule Relating to Fox Television Stations, Inc. WNYW, New York and the *New York Post*.

Today, the Commission grants Fox Television Stations Inc. [Fox] a permanent waiver of the broadcast-newspaper cross-ownership rule [cross-ownership rule]. Section 73.3555(d) of the Commission's rules, which generally proscribes common ownership of a broadcast station and a daily newspaper in the same market. Fox seeks a waiver so that it can continue to hold the license for television station WNYW, Channel 5, New York, New York, if and when the United States Bankruptcy Court for the Southern District of New York [Bankruptcy Court] rules that Fox is the bidder selected to acquire the *New York Post* [*Post*]. Fox, through NYP Acquisition Corp. [NYP], a subsidiary of News America, has provided funding to the *Post* since entering a management agreement with the Bankruptcy Court to provide on March 29, 1993.

After reviewing the record in this case, I cannot support, at this time, the grant of a permanent waiver to Fox of this cross-ownership rule. Without resolving at a full hearing many of the questions raised by this record, I believe the grant of a permanent waiver is defective as a matter of process, policy and law. Until the Bankruptcy Court has made its final selection of a bidder, I believe the Commission is only in a position to confirm that Fox is eligible for a temporary waiver at this time. To that extent, I would support the grant of a temporary waiver to Fox pending the outcome of the Bankruptcy Court proceeding. After the Bankruptcy Court process was completed, I would require a full hearing to resolve the questions raised by this record.

I cannot support the process by which this decision has been made for several reasons. First, as a matter of maintaining the integrity of the Commission's process, I do not believe this issue is ripe for adjudication. Although declaratory actions are within the discretion of this agency, I do not believe this process should be used to grant the "first" permanent waiver of our cross-ownership rule for the creation of a "new" broadcast-newspaper combination. Until the Bankruptcy Court process is completed, and a final bidder is selected to acquire the *Post*, I believe the Commission should only confirm that Fox is eligible for a temporary waiver under our current broadcast-newspaper cross-ownership rules, for up to one year or at time of license renewal, whichever is longer.

Second, the facts indicate that the *Post* has not been a profitable newspaper for a number of years.[1]

It is not clear that the *Post* has operated without subsidy from other businesses since it was sold in March 1988 to Mr. Peter Kalikow. Given that there are 35 other daily newspapers in the New York City Area of Dominant Influence [ADI], and three other daily newspapers in New York City, I do not understand the harm to diversity of either requiring the *Post* to be sold to bidders who do not require a waiver, or allowing the natural market forces to dictate the outcome of the Bankruptcy Court proceeding. New York is encompassed by the signals of 11 full-power television stations [including WNYW], and is the community of license of 24 AM and FM radio stations. Eight cable systems serve the five boroughs of New York City. Unlike New York, few if any cities in the nation support more than two dailies. Further, New York is served by 22 weekly newspapers, many of which cater to local news, or are published in the city. Thus, without conducting a hearing to explore the market factors in this proceeding further, it is not clear to me what marginal impact there is on diversity of saving the *Post* or losing the *Post* from circulation. In fact, at this point, the diversity argument appears to beg the question of whether a permanent waiver is even warranted, given the number of other voices that remain in the market, absent the *Post*.

Regardless of the market factors involved here, I believe the policy and legal rationale used to justify this precedent are not narrow enough to avoid permanent cross-ownership waiver requests in other markets. Thus, I would have preferred a hearing to resolve the questions of fact raised by our record in this proceeding. First, I believe that granting a permanent waiver to Fox at this time, subordinates this Commission cross-ownership rule to the business plan of a private entity, the desires of creditors, and the control of the Bankruptcy Court. Based on my review of this record, the following material questions of fact are raised and not resolved sufficiently at this time: The corporate structure of News Corporation Limited [News Corp.] and its role as a creditor in this Bankruptcy Court proceeding. Both Fox and NYP Acquisition Corp [NYP] are subsidiaries of News Corp. News Corp., through its publishing unit News America Publishing Incorporated [News America], has remained a contingent creditor to Mr. Peter S. Kalikow, current owner of the *Post*, and the New York Post Co., Inc., parent company of the *Post*. As a contingent creditor, News America is a member of the creditors' committee in Kalikow's personal bankruptcy, and subsequently in the *Post* 's bankruptcy proceedings. There is a question raised by this proceeding as to the viability and disclosure of another bid for the *Post* from Champion Holding Company [Champion]. I believe the declaratory ruling today resolves this issue prematurely, without investigating the effect of News America's involvement on the creditor committees in these bankruptcy court proceedings. Thus, I believe a hearing is warranted to resolve anyappearances raised by New America's involvement on the bankruptcy creditor committees in this proceeding.[2]

Finally, with respect to the case law cited in support of this permanent waiver, I cannot support the overall analysis. I do not believe our case precedent supports more than a temporary waiver. The Commission has previously granted only one permanent waiver since the television-newspaper broadcast rule was promulgated. That action

[1] Hogan & Hartson letter to the Commission, April 20, 1993, attachment of letter from Veronis, Suhler & Associates, Inc. to Arthur Siskind, executive vice president and group general counsel, The News Corporation Limited, April 19, 1993, pp. 3-4.

[2] News America also was granted a right of first refusal to purchase the Post if Kalikow proposed to dispose of it.

involved transferring control of a television station licensee to a party which already owned a 22.5 percent interest in that licensee, and whose parent corporation owned two daily newspapers in the same market.[3] In that case, the Commission found that the transaction did not create a *new ownership pattern*,[4] which is not true of the Fox waiver request.

Furthermore, it is not clear to me that our precedent permits more than a hearing to occur to resolve the merits of a permanent waiver request. The Commission previously sought such a hearing in a case where a permanent waiver was sought to permit a transfer of *de facto* control of a media property combination that had been grandfathered under the cross-ownership rules.[5] The Commission found that the financial data submitted in that matter was insufficient to determine whether the owner had, in fact, made a "reasonable, good faith" attempt to sell the financially troubled *Washington Star*.[6] The hearing was cancelled when the parties amended their application and sought a temporary waiver instead,[7] but that does not diminish the similarities between *Washington Star* and the Fox request. Fox argues that it is the only viable purchaser of the *Post*, but neither Fox nor Kalikow have provided the Commission with evidence sufficient to support that contention. No actual price has been cited for the *Post* transaction; the Commission has been asked to rely insteadupon the processes of the Bankruptcy Court to determine the best price.[8] Also, the information provided regarding Kalikow's effort to sell the *Post* is essentially anecdotal.[9] The media broker[10] and employee statements, characterizing the financial condition of the *Post*, also lack the detail needed for an accurate assessment of Fox's claims.[11]

The Declaratory Ruling seeks to distinguish *Washington Star* from Fox's request on the basis of the *Post's* status in Bankruptcy Court: that the financial status of the *Post* and efforts to sell the newspaper are matters for the Bankruptcy Court, not the Commission. However, such reasoning ignores Fox's primary argument to the Commission for granting the waiver: that Fox is the only viable purchaser for the *Post* as well as the only party capable of preventing the newspaper's demise. Also ignored are the many challenges on record to that assertion. Thus, it would appear that a substantial and material question of fact does exist, creating the need for a hearing under Section 309(d) of the Communications Act.

I contend that the Commission ought to grant a temporary waiver and let the Bankruptcy Court go forward with its determination. If NYP emerges as the owner from that proceeding, the Commission can then hold an evidentiary hearing to determine the facts regarding Fox's request for a permanent waiver. Such an approach would satisfy established precedent by permitting the Commission to pursue its responsibilities in this matter.[12] At the same time, the Commission's serious policy concerns in this matter would not be subordinated to the bankruptcy process. For these reasons, I cannot support this decision without requiring a hearing on the questions of fact, law and policy with respect to this permanent cross-ownership waiver.

Separate Statement
of
Commissioner Ervin S. Duggan

In the Matter of Fox Television Stations, Inc., Licensee of Television Station WNYW, New York, New York, Request for Waiver of the Broadcast-Newspaper Cross-Ownership Rule Relating to WNYW and the *New York Post*

I support granting this waiver in the interest of putting before the U.S. Bankruptcy Court of the Southern District of New York the most complete range of buyers for the *New York Post*. The life of the newspaper hangs in the

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[3] *Field Communications Corporation*, 65 F.C.C.2d 959 (1979), in which control of Kaiser Broadcasting Corporation, licensee of WFLD-TV in Chicago, went to Field Communications, which held a 22.5 percent interest in Kaiser and owned two daily newspapers. The Commission found that the transaction did not create a new ownership pattern because petitioner Field controlled the original permittee and licensee at commencement of operation of the station. Field assigned its controlling interest to Kaiser, ensuring its economic viability. Field retained the right to make first offer to purchase Kaiser's interest. Also, the proposal was not initiated by Field, but resulted from the complete liquidation of its controlling partner.

[4] *Id.*

[5] *Washington Star Communications, Inc.*, 54 F.C.C.2d 669 (1975).

[6] *Id.* at 676.

[7] *Crosby N. Boyd, et al.*, 57 F.C.C.2d 475 (1976).

[8] Hogan & Hartson Letter to the Commission, April 20, 1993, pp. 1-3, and attached letter from Veronis, Suhler & Associates, Inc., to Arthur Siskind, executive vice president and group general counsel, The News Corporation Limited, April 19, 1993, p. 9.

[9] Request for Waiver of the Newspaper/Broadcast Cross-Ownership Rule Relating to WNYW(TV) and *The New York Post*, Appendix E, Letter from Peter S. Kalikow to Commission Chairman James Quello, April 5, 1993, pp. 1-2, and Hogan & Hartson letter to the Commission, April 20, 1993, attachment of letter from Peter S. Kalikow to Commission Chairman James Quello, April 19, 1993, pp. 1-3.

[10] Hogan & Hartson letter to the Commission, April 20, 1993, attachment of letter from Veronis, Suhler & Associates, Inc. to Arthur Siskind, executive vice president and group general counsel, The News Corporation Limited, April 19, 1993.

[11] Request for Waiver of the Newspaper/Broadcast Cross-ownership Rule Relating to WNYW(TV) and *The New York Post*, Appendix C, April 7, 1993.

[12] *LaRose v. FCC*, 494 F.2d 1145, 1146 n.2 (D.C. Cir. 1974), in which the court asserted that the Commission should "be alert to determine whether its policies might conflict with other federal policies and whether such conflict can be minimized." This was a bankruptcy proceeding, in which the receiver, as involuntary assignee of a corporate bankrupt's radio station license, appealed a Commission decision denying license renewal and refusing, "on the grounds of administrative finality, to entertain petition for reconsideration accompanied by a new proposal of sale." There was no Commission waiver involved in this case. The Court of Appeals reversed the Commission and remanded the matter, holding that it was an abuse of discretion for the Commission to refuse to consider the merits of the court-appointed receiver's proposed sale and assignment of the corporate bankrupts's broadcast license within weeks of the Commission's refusal to renew the license because of the bankrupt principal's misconduct. The Court said the action constituted an abuse of discretion because it operated to frustrate public interests recognized in the "Second Thursday" doctrine by effectively depriving creditors of significant recovery of their money. Id. at 1145.

balance, and without resolution of this waiver request and the quick resuscitation of the *Post*, a distinctive voice in the New York marketplace could well be lost. Such a loss would be utterly antithetical to our clear and historic policy of framing our regulations to promote a diversity of viewpoints. Since granting the waiver would in my judgment have the effect of promoting viewpoint diversity, I support our action.

To those who would insist on rigid adherence by the Commission to the cross-ownership ban, and as one who has at times criticized waivers of our ownership rules, I would say this: The Commission has always tempered its skepticism about the benefits of cross-ownership with a dispassionate analysis of the hard realities of the marketplace. In my judgment, such an analysis in this case demonstrates that waiving the rule will not in any way threaten diversity of expression in New York City. (Curiously, some opponents of the waiver appear to object on the grounds that it might provide too much diversity.) What is clear to me is that there is no more media-intensive market in the nation than New York. At a time when a mere handful of two-newspaper towns still exist in the United States, I see nothing but harm in a decision that might deprive New York of its status as a three newspaper town.

Granting this waiver helps forestall such an outcome by permitting the Bankruptcy Court to make its own reasoned judgments about the range of available purchasers of the *Post* unclouded by doubt about the FCC's ultimate position on the cross-ownership of the *Post* and WNYW(TV). It says nothing about what the Commission might believe about the qualifications of those purchasers, including the primary challenger, Champion Holding Company. That decision is the court's to make.

Finally, I also would underscore a fact that opponents of this permanent waiver have, in my judgment, failed to refute. On one other occasion, the Commission considered and then rejected a permanent waiver to permit the cross-ownership of a television station and a daily newspaper in the same market: in Washington, D.C. The newspaper was the *Washington Star*. The FCC refused a permanent waiver, and today the *Star* is silent: No victory for media diversity. A different decision here, in my judgment, offers the greatest hope of saving a troubled newspaper and broadening the range of editorial voices in New York.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-213

In the Matter of

Transport Rate Structure and
Pricing

FIRST MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: July 21, 1993; **Released: July 21, 1993**

By the Commission:

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I. INTRODUCTION

A. Summary

1. Last September, we adopted interim rules to govern the rate structure and pricing of the transport component of interstate switched access provided by local exchange carriers (LECs) to enable interexchange carriers (IXCs) to originate and terminate interstate traffic.[1] Twenty-one parties have sought reconsideration or clarification of almost every issue considered in this proceeding, and requested guidance on how the interim rules should apply to certain configurations not addressed in the *Transport Order*.[2] In this Order, we reconsider and clarify certain issues on which guidance is needed before the LECs file their initial transport rates. Specifically, we address: (1) application of the interim rate structure to configurations not addressed in the *Transport Order;* (2) issues relating to the derivation of initial transport rates; and (3) clarification of implementation procedures. None of these issues would fundamentally change the balance struck in the *Transport Order.* Issues raised in petitions for reconsideration that are not addressed here will be addressed at a later date. In addition, we are changing the date on which LECs are required to file tariff revisions incorporating the new transport rate structure and pricing rules from August 2, 1993 to September 1, 1993; the effective date of these tariff revisions should be December 1, 1993.

B. Background

2. In the *Transport Order*, we concluded that the public interest required modification of the current requirement that the LECs charge an equal amount per unit of interstate switched transport traffic.[3] We determined that the interim rate structure and pricing plan better serves three goals: (1) encouraging efficient use of transport facilities by allowing pricing that reflects the way costs are incurred; (2) facilitating full and fair interexchange competition; and (3) avoiding interference with the development of interstate access competition. The interim transport rate structure consists of entrance facilities, direct-trunked transport, tandem-switched transport, and the interconnection charge.

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[1] *Transport Rate Structure and Pricing*, Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 91-213, 7 FCC Rcd 7006 (1992) (*Transport Order* or *Order*).

[2] Appendix A contains a list of parties filing petitions for reconsideration or clarification and comments and reply comments thereon, as well as the abbreviations used to refer to the parties.

[3] *See Transport Order*, 7 FCC Rcd at 7009-12, ¶ ¶ 5-14. Prior to the effective date of the interim rate structure, the LECs are required to retain the existing equal charge per unit of traffic rate structure. *Transport Rate Structure and Pricing*, CC Docket Nos. 78-72 (Phase I) and 91-213, Order and Further Notice of Proposed Rulemaking, 6 FCC Rcd 5341 (1991).

Entrance facilities constitute transmission between the IXC's point of presence (POP) and the LEC office serving that POP, called a serving wire center (SWC). Direct-trunked transport is transmission of traffic between the LEC SWC and a LEC end office requiring no tandem switching. Tandem-switched transport is transmission of traffic between the SWC and an end office that is switched at a tandem. Flat charges apply to entrance facilities and direct-trunked transport, while usage-sensitive charges apply to tandem-switched transport. The interconnection charge is usage-sensitive and is to be paid by all interstate access customers that interconnect with the LEC switched access network.

3. We concluded that initial entrance facilities and direct-trunked transport rates will be presumed reasonable if based on the non-discounted rates for equivalent special access offerings as of September 1, 1992, provided that such rates satisfy a benchmark DS3-to-DS1 ratio of 9.6-to-1. Initial tandem-switched transport rates will be presumed reasonable if set as a per-minute equivalent of direct-trunked transport, based on a weighted average of DS3 and DS1 rates, plus a tandem charge set to recover 20% of the interstate transport revenue requirement for tandem switches. The interconnection charge will initially be priced on a residual basis. The LECs were required to file tariffs offering transport pursuant to the interim rate structure and pricing rules on August 2, 1993; these tariffs were to become effective on or about November 1, 1993.

II. RATE STRUCTURE

A. Intermediate Hubbing

4. *Order.* Intermediate hubbing is a configuration of interoffice special access or transport facilities that permits an access customer to use higher-capacity facilities (*e.g.*, DS3) from the SWC to an intermediate hub office, and demultiplex the traffic to lower-capacity facilities (*e.g.*, DS1) from the intermediate hub office to multiple end offices. The rules adopted in the *Transport Order*, read literally, do not permit hubbed configurations of interoffice transport. For example, Sections 69.2(oo) and 69.112(b)(1) of the Commission's rules state that direct-trunked transport constitutes transport between the SWC and the end office, and that mileage shall be measured as airline mileage between the SWC and the end office.

5. *Positions of the Parties.* Sprint and a number of LECs seek clarification of the rules to permit access customers to order direct-trunked transport (*e.g.*, at the DS3 level) to an intermediate office and direct-trunked transport (*e.g.*, at the DS1 level) from that hub to various end offices.[4] These parties argue that hubbing is a reasonable method for access customers and LECs to realize efficiencies, as the Commission recognized in the *Expanded Interconnection Order*. Sprint argues that intermediate hubbing would enable smaller carriers to order DS3 facilities as far into the local network as possible.[5] Allnet argues that Sprint's requested clarification is unnecessary because the rules do not dictate the physical configuration, but only the pricing structure, and that hubbing is allowed under the rules.[6] MFS, on the other hand, opposes permitting LECs to offer transport based on intermediate hubbing, unless and until competitors can interconnect at intermediate offices and the interim rate structure is revised so that each level of LEC dedicated transport -- voice grade, DS1, and DS3 -- is priced in a consistent relationship to its costs.[7]

6. Several LECs also request authority to offer a tandem-switched option that is complementary to the hubbing proposals. These LECs seek authority to offer customers the option of tandem-switched transport on an unbundled basis, including a flat rate for the SWC-to-tandem segment and per-minute charges for the tandem-to-end office segments.[8] The LECs, as well as AT&T, argue that in the context of expanded interconnection for switched transport, allowing LECs to offer unbundled tandem-switched transport would facilitate full competition.[9] The LECs also argue that including this option would expand the range of service options available to tandem-switched transport users. Several other IXCs do not object to such an option being available, as long as tandem-switched transport is also available with mileage measured from the SWC to the end office.[10]

7. *Discussion.* In the *Expanded Interconnection Order*, we found that "hubbing . . . arrangements are reasonable means of permitting customers flexibility in structuring their leased special access networks, and allowing the LECs to engineer their access networks efficiently using higher capacity facilities."[11] Hubbing thus permits access customers to use the network efficiently and increases opportunities for interexchange competition.

8. MFS's argument that hubbing should be conditioned on competitors' ability to interconnect at intermediate hubs is addressed by our proposal to authorize expanded interconnection for switched services at central offices, including intermediate offices. MFS's other objection (that hubbing should be conditioned on LECs' pricing transport offerings so that the prices have a uniform relationship to underlying costs) is unpersuasive. We conclude such a requirement is unnecessary in this case, particularly once competitors have the same opportunity as LECs to provide a full range of services, including hubbed services. Moreover, permitting hubbing is in the public interest regardless of the status of expanded interconnection and local access competition, for the reasons stated in the preceding paragraph. Accordingly, we are revising the rules to clarify that intermediate hubbing is permitted.

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[4] Sprint Petition at 16; Sprint Opposition at 7; GTE Petition at 22-24; GTE Opposition at 12. *Accord*, Ameritech Opposition at 10-11; BellSouth Opposition at 17-18; NYNEX Opposition at 12-13; USTA Opposition at 7-8; United Opposition at 8-9.

[5] Sprint Reply at 7.

[6] Allnet Opposition at 4 n.6.

[7] MFS Opposition at 15-16.

[8] *See, e.g.*, Bell Atlantic Petition at 6-7; GTE Opposition at 15; GTE Reply at 3; SW Bell Petition at 5-6; U S West Petition at 6-7.

[9] *See supra* note 8; AT&T Petition at 5 n.6.q

[10] *See, e.g.*, CompTel Opposition at 4; Sprint Opposition at 4.

[11] *Expanded Interconnection with Local Telephone Company Facilities*, Report and Order, CC Docket No. 91-141, 7 FCC Rcd 7369, 7463, ¶ 199 (1992) (*Expanded Interconnection Order*), *recon.*, 8 FCC Rcd 127 (1992), *pets. for recon. pending, appeal pending sub nom. Bell Atlantic Corp. v. FCC*, No. 92-1619 (D.C. Cir., filed Nov. 25, 1992).

9. As a corollary to our hubbing clarification, we modify our rules to enable access customers to order direct-trunked transport between SWCs and access tandems, and tandem-switched transport between access tandems and end offices. This option, which many parties support, and no commenting party opposes, should enable parties to use the LEC network more efficiently, and would be more consistent with local access competition. We do not, however, modify our requirement that LECs make available tandem-switched transport between SWCs and end offices on a per-minute basis, with mileage measured between the SWC and the end office.

B. Host-Remote Configurations

10. *Order/Background.* We did not address how to apply the interim transport rate structure to host-remote switching configurations, under which all IXC traffic is routed through a host office, which performs all measurement and recording for the remote office. Direct-trunked transport cannot be provided all the way from SWCs to remote offices because facilities between host offices and remote offices are shared. We did, however, exempt small LECs that lack measurement and billing capabilities at their end offices from the requirement to provide direct-trunked transport.[12]

11. *Positions of the Parties.* USTA and a number of LECs recommend that LECs be allowed to offer flat-rate direct transport rates between SWCs and host offices, and a separate rate element for common traffic between host and remote offices, set on a distance-sensitive, per-minute basis equivalent to tandem-switched transport less the cost of tandem switching.[13] USTA and SW Bell also recommend that tandem-switched transport customers pay for tandem-switched transport on a per-minute basis based on the airline mileage between the SWC and the remote office.[14]

12. AT&T, Sprint, and CompTel generally support USTA's suggestions as reasonable.[15] MFS also agrees that direct-trunked transport should be available to host offices when remotes are incapable of accommodating direct trunks, but argues that the common transport facility between the host and the remote will be a bottleneck facility, and that the Commission should assure that the rates for this facility are cost-based and do not include excessive overhead loadings.[16]

13. *Discussion.* We conclude that customers should be able to purchase direct-trunked transport from a SWC to a host office, and to pay a per-minute rate for the shared facilities between the host office and remote offices. This per-minute rate would be based on tandem-switched transport rates, but with no tandem charge, with mileage measured between the host office and remote offices. No party objects to this treatment of direct-trunked transport under host-remote configurations recommended by USTA and several LECs.

14. We also conclude that the LECs should treat tandem-switched transport and direct-trunked transport in an equivalent manner in the context of host-remote configurations. We therefore disagree with USTA's and the LECs' proposal. We conclude that the LECs should offer tandem-switched transport between the SWC and the host office, based on the airline mileage between those offices. As with direct-trunked transport, LECs should offer host-to-remote transport under a per-minute rate (based on tandem-switched transport rates, but with no tandem charge) for the shared facilities between the host office and remote offices, with mileage measured between the host office and remote offices.[17]

C. Feature Group A

15. *Order/Background.* We did not address the application of the interim transport rate structure and pricing rules to Feature Group A. Feature Group A is similar to a local exchange service, but is used to provide interstate access. IXCs use Feature Group A as a form of switched access to originate and terminate calls by their end user customers. In such circumstances, the end user dials a seven digit number to reach the LEC's "dial tone office" serving the IXC, where the LEC switches the call to the IXC's POP via a dedicated, loop-side connection. In many cases, the dial tone office is the SWC; in some cases, dial tone is provided from a different office, in which case there will be a separate SWC between the dial tone office and the POP.[18]

16. Under Feature Group A, dedicated LEC facilities provide the connection between the IXC POP and the dial tone office. Common facilities are used to connect the dial tone office with the end office serving users. In general, originating Feature Group A transport is billed using mileage measured from the dial tone office to the SWC. Terminating Feature Group A is frequently billed using mileage measured from the SWC to the end office. In general, the difference in mileage measurement is necessitated by the inability of most LEC end office switches to differentiate between originating Feature Group A traffic and local traffic.

17. *Positions of the Parties.* USTA and a number of LECs recommend that direct-trunked transport rates be applied to both originating and terminating traffic between the SWC and the dial tone office, and tandem-switched transport rates (including the tandem charge if a tandem is used, at the LEC's option) be applied to terminating traffic

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[12] *Order*, 7 FCC Rcd at 7049-51, ¶ ¶ 90, 94.

[13] USTA Petition at 17-18; GTE Petition at 21-22; SW Bell Petition at 19; U S West Petition at 19-20; Cincinnati Bell Petition at 7-8; United Petition at 1-3 (arguing that the Commission need not determine whether such charges are to be distance sensitive); Ameritech Opposition at 9; BellSouth Opposition at 16-17; *Ex Parte* Letter From Linda L. Kent, Associate General Counsel, USTA, to Donna Searcy, Secretary, FCC, Attachment at 8 (April 22, 1993) (arguing that USTA's proposed treatment of tandem-switched transport measures mileage between points where service was requested by an IXC and avoids charging for two usage-based components not ordered by the IXC).

[14] USTA Petition at 17; SW Bell Petition at 19-20.

[15] AT&T Opposition at 22-23; CompTel Reply at 8; Sprint Opposition at 8.

[16] MFS Opposition at 15.

[17] Appendix B contains a chart illustrating our treatment of host-remote configurations under the interim rate structure.

[18] Feature Group A is also used by end users as part of a Foreign Exchange (FX) or Off Network Access Line (ONAL) arrangement. In this configuration, the customer obtains local switched service with a seven digit local number, and dedicated facilities linking the LEC end office serving the customer to a POP or other IXC facility.

from the dial tone office to the end office.[19] SW Bell proposes two options: a structure similar to USTA's, and a structure in which tandem-switched transport rates would apply to any dedicated facilities between the dial tone office and the SWC, as well as the shared facilities between the dial tone office and the end office.[20] SW Bell would not apply a tandem charge regardless of whether a tandem is used, because it argues that in this case, routing through a tandem is entirely the LEC's decision and is outside the control of the Feature Group A customer.

18. *Discussion.* The manner in which LECs provide Feature Group A service requires that we adjust the interim transport rate structure in order to permit its application to Feature Group A. We conclude that the treatment of Feature Group A recommended by USTA is generally in the public interest. Entrance facility rates should apply to transport between the POP and the SWC. If the SWC is not the dial tone office, direct-trunked transport rates should apply to transport between the SWC and the dial tone office. Tandem-switched transport rates, excluding the tandem charge, should apply to transport between the dial tone office and the end office.[21] Unlike customers of tandem-switched transport under Feature Groups B or D, who have the option of buying direct-trunked transport between SWCs and end offices, Feature Group A customers have no control over whether their traffic between dial tone offices and end offices is switched at LEC tandems. Accordingly, Feature Group A customers should not be required to pay the tandem charge.[22]

D. 800 Service

19. LECs must deliver originating 800 traffic through access tandems from end offices that do not have a service switching point (SSP) deployed. United requests that the Commission clarify that LECs are allowed to rate such traffic as tandem-switched transport and are not required to provide direct-trunked transport for originating 800 service from those end offices that are not SSP-equipped.[23] WilTel supports United's request.[24] In an argument not raised in its comments or reply comments, but in an *ex parte* letter, MCI opposes United's request, arguing that IXCs should not be forced to pay tandem-switched transport rates when the routing of traffic through the tandem is due to the configuration of the LEC's network (*i.e.*, deployment of SS7).[25] The implementation of the Commission's *800 Database* proceeding,[26] which will greatly increase competition for 800 services, will result temporarily in the routing of additional originating 800 traffic through tandems. This temporary routing requirement affects all IXCs in the same way. The transport rate structure contemplates that traffic routed through tandems will be treated as tandem-switched transport and rated accordingly. We conclude that treating tandem-switched traffic as direct-trunked transport would undermine our goal of fostering rates that reflect the way costs are incurred, would unnecessarily complicate the transport rates and increase the interconnection charge, and appears to have little purpose. Accordingly, we clarify that this tandem-switched traffic should be assessed rates for tandem-switched transport.

III. INITIAL PRICING

A. General Issues

1. September 1992 versus July 1993 Special Access Rates as Baseline

20. *Order.* We concluded that initial direct-trunked transport and entrance facility rates will be presumed reasonable and allowed to go into effect if they are based on non-discounted special access rates effective on September 1, 1992, adjusted for changes in the price cap index calculated for the July 1993 annual filing for price cap LECs, and if the DS3/DS1 benchmark ratio requirement is satisfied.[27]

21. *Positions of the Parties.* The parties' petitions, comments, and reply comments were submitted before the LECs filed their proposed July 1993 special access rates. Most of the LECs argue that initial transport rates should be based on July 1993 special access rates, rather than September 1992 rates.[28] They argue that many LECs are modifying and improving their special access rates to respond to competitive pressures, and that the Commission's objectives would be better served by special access and direct-trunked transport rates that are as close as possible. They also generally argue against subjecting initial transport rates to a DS3-to-DS1 benchmark requirement, and argue that transport rates should be allowed to embody all the discounts applicable to existing special access rates.

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[19] USTA Petition at 19; GTE Petition at 24-25; U S West Petition at 21; United Petition at 4-5. *Accord*, Ameritech Opposition at 10; BellSouth Opposition at 15-16.

[20] SW Bell Petition at 20-23.

[21] If a LEC's dial tone office switches are incapable of distinguishing between originating Feature Group A access traffic and local exchange traffic, the LEC may forego billing Feature Group A customers for originating transport from end offices to dial tone offices.

[22] Appendix B contains charts illustrating our conclusions regarding the treatment of Feature Group A under the interim rate structure.

[23] United Petition at 3-4.

[24] WilTel Opposition at 18.

[25] *Ex Parte* Letter from Leonard S. Sawicki, Senior Manager, Regulatory Affairs, MCI, to Donna Searcy, Secretary, FCC (May 14, 1993) at 16.

[26] *Provision of Access for 800 Service*, CC Docket No. 86-10, Report and Order, 4 FCC Rcd 2824 (1989), *recon.*, 6 FCC Rcd 5421 (1991), *pets. for recon. pending, appeal pending sub nom. GTE Service Corp. v. FCC*, No. 91-1507 (D.C. Cir., filed Oct. 17, 1991) (held in abeyance pending final agency action on reconsideration); Second Report and Order, 8 FCC Rcd 907 (1993).

[27] *Order*, 7 FCC Rcd at 7029, 7034-35, ¶ ¶ 44, 53-54; §§ 69.110(b), 69.112(b). Transport rates filed by LECs whose special access rates have DS3-to-DS1 ratios below the 9.6-to-1 benchmark will be presumed reasonable if their transport rates satisfy the 9.6-to-1 benchmark and if the ratio of revenue recovered through the interconnection charge to revenue recovered through facilities-based charges is the same as it would be if the LEC's existing special access rates were used. *Id.*, 7 FCC Rcd at 7034, ¶ 52.

[28] USTA Petition at 7-8; Ameritech Petition at 4-5; BellSouth Petition at 12-14; GTE Petition at 2-5; SNET Petition at 4; SW Bell Petition at 14; U S West Petition at 9-10; United Petition at 4-5; Pacific Opposition at 3; U S West Opposition at 2; USTA Opposition at 5-6.

22. CompTel, WilTel, and Sprint, in their original petitions, argue that as long as a higher, mandatory DS3/DS1 benchmark ratio is imposed, initial DS3 direct-trunked transport rates should be based on July 1993 DS3 special access rates, rather than 1992 rates.[29] In a subsequent *ex parte* filing submitted after the LECs filed their annual access tariffs, CompTel states that it is indifferent to whether September 1992 or July 1993 rates are used.[30] Ameritech, AT&T, and MCI support using 1993 rates instead of 1992 rates, provided that the proportion of transport revenue recovered through the interconnection charge versus facilities P based charges is no greater than if 1992 rates had been used.[31] Ad Hoc supports the use of September 1992 rates, arguing that use of such rates eliminates LECs' ability to manipulate special access rates in order to "game" transport rates.[32]

23. *Discussion.* We retain our conclusion that initial transport rates will be presumed reasonable if they are based on special access rates effective on September 1, 1992. With respect to this and several other issues related to initial transport rates, there may be a trade-off between the possibility of attaining marginally greater precision and other objectives, including verifiability, clarity, timely implementation, and administrative convenience. Because we believe that the perfect must not become the enemy of the good, we are unwilling to make changes to the rules governing initial transport rates at this time if such changes impose significantly greater complexity on the parties or Commission staff, or if such changes would make it more difficult for Commission staff and the parties to review and verify assertions that are the basis for LEC tariff filings, unless there are substantial public interest benefits in doing so. Moreover, because the interim transport rate structure and pricing rules already represent a major change for LECs and IXCs, we are reluctant to make additional changes that could further complicate the situation unless such changes appear to create significant benefits. For these reasons, at this time we adopt changes to the rules regarding initial transport rates only if such changes are simple to implement and clearly further the three stated goals in this proceeding.

24. We believe that retaining September 1992 special access rates as the baseline for deriving initial transport rates strikes a better balance of our objectives than the alternatives that parties suggest. The September 1992 special access rates will form the basis of only initial switched transport rates. The LECs have argued that, given the similarities between the facilities used for special access and those used for transport entrance facilities and direct-trunked interoffice transport, substantial benefits will flow from allowing LECs to price transport and special access at the same levels. Even if we accepted this argument, many of the LECs have submitted zone density plans for pricing special access in the near future, so special access and transport rates are likely to diverge at least in the short term.[33] Moreover, price cap LECs have some flexibility, subsequent to the implementation of the initial rates, to change their transport rates and bring them closer to current special access rate levels. Thus, there is little to be gained from using July 1993 rates.

25. We are concerned, however, that using July 1993 rates would impose additional costs for little or no gain. For many LECs, the use of July 1993 rates rather than September 1992 rates would cause the percentage of revenue recovered through the interconnection charge to increase. A proportionally higher interconnection charge could impede local access competition, and weaken the incentives in the new transport rate structure for efficient use of LEC networks because it results in transport prices more similar to pricing under the equal charge rule. In the absence of substantial public interest benefits, we are unwilling to make changes that could cause a proportionally higher interconnection charge. Ameritech, AT&T, and MCI have suggested that the LECs be allowed to use July 1993 rates if they can demonstrate that the percentage of transport revenue recovered through the interconnection charge is no higher than it would have been if September 1992 rates had been used. Although this exercise would alleviate concerns about a higher interconnection charge, it would create additional administrative complexity. In addition, it is unlikely to result in a transport rate restructure that is revenue-neutral.[34] We conclude that the costs of using July 1993 rates outweigh whatever minimal benefits this change might bring. Accordingly, we conclude that initial transport rates will be presumed reasonable if based on September 1992 special access rates.[35]

2. Rate Derivation

26. *Order.* We determined that initial direct-trunked transport and entrance facility rates would be presumed reasonable if based on special access rates. We held that special access channel terminations are comparable to the entrance facilities of the switched access network, and that special access interoffice mileage is comparable to inter-

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[29] CompTel Petition at 15; WilTel Petition at 13-14; Sprint Petition at 4-5.

[30] *Ex Parte* Letter from Genevieve Morelli, Vice-President and General Counsel, CompTel, to Ruth Milkman, Deputy Chief, Policy and Program Planning Division, Common Carrier Bureau, FCC (May 12, 1993).

[31] Ameritech Petition at 5; AT&T Opposition at 7 n.13; MCI Opposition at 15-16.

[32] Ad Hoc Opposition at 4.

[33] We proposed to apply the system of density pricing zones to transport rates in our Second Notice of Proposed Rulemaking in the *Expanded Interconnection* proceeding. *See Expanded Interconnection with Local Telephone Company Facilities*, Second Notice of Proposed Rulemaking, CC Docket No. 91-141, 7 FCC Rcd 7740, 7746, ¶ ¶ 32-35 (1992) (*Expanded Interconnection Second Notice*).

[34] An interconnection charge set at a level designed to yield revenue neutrality based on September 1992 special access rates would not produce revenue neutrality if used in combination with a different set of special access rates, because the revenues produced by the two sets of facilities charges are unlikely to be identical.

[35] Price cap LECs' transport rates will be presumed reasonable if based on September 1, 1992 special access rates adjusted for changes in the price cap index calculated for the July 1, 1993 annual filing. 47 C.F.R. §§ 69.110(b)(1), 69.112(b)(1). Changes in the price cap index include the exogenous change reflecting our reallocation of general support facility (GSF) costs. Rate-of-return LECs' transport rates will be presumed reasonable if based on September 1, 1992 special access rates adjusted to reflect the reallocation of GSF costs. *See Amendment of the Part 69 Allocation of General Support Facility Costs*, Report and Order, CC Docket No. 92-222, 8 FCC Rcd 3697, 3700, ¶ 16 n.53 (1993).

office transport.[36] We also decided that initial tandem-switched transport rates would be presumed reasonable if based on direct-trunked transport rates, and said that both direct-trunked transport and tandem-switched transport would generally include non-distance-sensitive and distance-sensitive charges.[37]

27. *Positions of the Parties.* CompTel asks for clarification that entrance facility and direct-trunked transport rates must be set equal to special access rates on a "rate element" basis, and in particular, that such rates be set using separate calculations for non-distance-sensitive and distance-sensitive elements.[38] CompTel makes the same request regarding the derivation of tandem-switched transport rates from direct-trunked transport rates.[39] USTA and GTE oppose these proposals, arguing that they are contrary to price cap regulation, are unnecessary to prevent discrimination, and would constitute a rate prescription inconsistent with the requirements of Section 205.[40]

28. *Discussion.* We now clarify how initial transport rates are to be set. First, LECs' initial rates for direct-trunked transport and entrance facilities will be presumed reasonable only if the rate for each transport service component is set equal to the corresponding special access service component.[41] Second, LECs' initial rates for tandem-switched transport will be presumed reasonable only if rates for tandem-switched transport service components (other than the tandem charge) are set on the basis of the rates for corresponding direct-trunked transport service components. We also clarify that initial charges for multiplexing and other features and functions that are needed for switched transport, but not for special access, will be presumed reasonable if they are set equal to rates for comparable multiplexing and other features and functions in the special access tariffs. An example of a function needed for switched transport, but not special access, is the multiplexing needed to connect transport facilities at particular capacities (*e.g.*, DS3) with particular types of end office switches (*e.g.*, most current digital switches, which require a handoff at the DS1 level, and analog switches, which require a handoff at the DS0 level).

29. We find these clarifications to be consistent with our general approach of using special access rates as the basis for initial switched transport rates. These clarifications should ensure that initial transport rates reflect the same degree of distance sensitivity as special access rates. They should also enable LECs to charge users of specific features and functions for the use of such services, rather than including the cost of such services in the interconnection charge. The LECs have offered no policy reasons for deriving transport rates in any other way. Moreover, this clarification is consistent with the price cap rules because the transport rate restructure is not an ordinary rate restructure, but requires more than simple revenue neutrality. Finally, clarifying the methodology for deriving rates that will be presumed reasonable does not constitute a rate prescription.

B. Initial Direct-Trunked Transport and Entrance Facility Rates

30. *Order.* The *Order* states that initial rates for direct-trunked transport and entrance facilities will be presumed reasonable if they are set at the level of equivalent special access rates in effect on September 1, 1992. Some LECs had no DS3 or DS1 special access rates in effect on that date, but anticipate demand for direct-trunked transport and entrance facilities at the DS3 or DS1 level. A Public Notice was issued seeking additional comments on this

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[36] *Order*, 7 FCC Rcd at 7028-29, ¶ ¶ 42-44.n

[37] *Order*, 7 FCC Rcd at 7036-37, ¶ ¶ 56-57.

[38] CompTel Petition at 14.

[39] *Id.*

[40] USTA Opposition at 9-10; GTE Opposition at 5.

[41] For this purpose, transport service components include: (1) the non-distance sensitive component of interoffice transport rates, (2) the distance sensitive components of interoffice transport rates (*i.e.*, rates applicable to each mileage band), (3) the non-distance sensitive component of entrance facility rates, (4) the distance sensitive components of entrance facility rates (if any), (5) multiplexing charges, (6) charges for other features and functions, and (7) non-recurring charges.

issue.[42] That Public Notice suggested, for example, that a LEC could develop transport rates based on a comparison of its rates for other special access services with a neighboring LEC's rates for such services. Specifically, such a LEC could compare its rates for special access service at a capacity that it *does* offer (*e.g.*, DS1) with the rates of the contiguous Bell Operating Company (BOC) or other contiguous LEC for the same (DS1) service. The LEC's rates for direct-trunked transport and entrance facilities at the capacity it does not offer (*e.g.*, DS3) could be set to diverge from the BOC's or other LEC's rates for DS3 special access services by the same percentage that its rates for special access services it offers (*e.g.*, DS1) diverge from the neighboring LEC's rates for such services.[43] The Public Notice also sought comment on whether alternative surrogates could be developed that are objectively verifiable and simple to implement, or whether the new service test applicable under price cap or rate of return regulation should be used.

31. *Positions of the Parties.* USTA advocates allowing LECs to develop surrogates based on their own determination of a reasonable methodology, or to develop a cost-based DS3 direct-trunked transport rate, at their option.[44] Rochester, which has non-Tier 1 affiliates adjacent to several different BOCs, supports using the 9.6-to-1 ratio to develop DS3 transport rates based on existing special access DS1 rates.[45] United argues that transport rates based on the generally applicable DS3 special access rates it filed subsequent to September 1992 should be presumed reasonable.[46] GVNW supports use of the new service test generally applicable to rate-of-return LECs.[47]

32. CompTel recommends establishing an industry-wide surrogate, such as NECA's special access DS1 and DS3 rates.[48] MCI does not object to adopting the proposal in the Public Notice during the period that the interim rate structure is effective, but generally opposes using surrogates (including existing special access rates) in the long term and advocates developing those transport rates based on cost.[49] WilTel and Sprint both support permitting LECs that have introduced high capacity special access rates subsequent to September 1992 to use those rates, subject to compliance with the benchmark requirements.[50] With respect to other LECs, WilTel recommends allowing them to use special access rates in the NECA tariff to develop transport rates, while Sprint supports use of the new service test for rate-of-return LECs.[51]

33. *Discussion.* We conclude that LECs that cannot satisfy the criteria in the *Order* because they lacked generally tariffed special access rates at certain capacities (*e.g.*, DS3 or DS1) in September 1992 may propose rates based on reasonable criteria, for which the LEC must provide justification. For example, initial transport rates based on special access rates filed subsequent to September 1992 could well be demonstrated to be reasonable, as could rates set pursuant to the proposal in the Public Notice, or rates justified by cost support. These rates, however, will not be accorded a presumption of reasonableness; we will review their reasonableness in the tariff process. We believe that this approach is more likely to yield reasonable results than selecting an industry-wide surrogate, which could yield anomalous results in individual circumstances. In addition, we believe that use of a surrogate such as those described in the Public Notice to set transport rates may be reasonable, and we therefore decline to require LECs that lacked rates for certain special access services in September 1992 to set transport rates in accordance with the new service test.

C. Initial Tandem-Switched Transport Rates

1. Circuit Mix Used to Derive Rates

34. *Order.* We stated that tandem-switched transport rates will be presumed reasonable only if they are based on an average of the DS1 and DS3 rates used for direct-trunked transport, weighted to reflect the relative DS1 and DS3 circuit mix in the tandem-to-end-office link.[52]

35. *Positions of the Parties.* U S West requests that the Commission reconsider its use of the actual DS3/DS1 circuit mix in establishing rates for tandem-switched transport, asserting that this information is not currently available and that the requirement is not consistent with the modeling runs submitted during the course of the proceeding. Instead, U S West suggests using the proportion of fiber/copper interoffice facilities, information currently provided through ARMIS, as a surrogate for the DS3/DS1 circuit mix.[53] CompTel and WilTel assert that the Commission cannot rely upon a counting of DS3 and DS1 circuits, and support the use of fiber/copper data from ARMIS filings as a more verifiable measurement for calculating the weighting factor for tandem-switched transport rates.[54]

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[42] Public Notice, *Comments Requested on the Manner in Which LECs with No Special Access Offerings at Certain Capacities Should Establish Rates for Direct-Trunked Transport and Entrance Facilities at Such Capacities*, CC Docket No. 91-213, 8 FCC Rcd 2542 (1993). Appendix A includes a list of parties filing comments and reply comments in response to this Public Notice.

[43] For example, if the subject LEC's rate for a DS1 special access channel termination were $240 per month and the neighboring LEC's rate for the same service were $200 per month, then the subject LEC could set its rate for DS3 switched transport entrance facilities at 120% of the neighboring LEC's rate for a DS3 special access channel termination.

[44] USTA Comments on Public Notice at 2; *accord*, Rochester Reply Comments on Public Notice at 2.

[45] Rochester Comments on Public Notice at 5; Rochester Reply Comments on Public Notice at 2-3.

[46] United Comments on Public Notice at 3-5; United Reply Comments on Public Notice at 2-3; *accord*, Rochester Reply Comments on Public Notice at 1-2.

[47] GVNW Comments on Public Notice at 3-4, *citing* §§ 61.38 and 61.39 of our Rules, 47 C.F.R. §§ 61.38 and 61.39.

[48] CompTel Comments on Public Notice at 2.

[49] MCI Comments on Public Notice at 2-4.

[50] WilTel Comments on Public Notice at 2; Sprint Comments on Public Notice at 2-3; Sprint Reply Comments on Public Notice at 3.

[51] WilTel Comments on Public Notice at 4; Sprint Comments on Public Notice at 4; Sprint Reply Comments on Public Notice at 3-4.

[52] *Order*, 7 FCC Rcd at 7037, ¶ 58.

[53] U S West Petition at 17-18. *Accord*, NYNEX Opposition at 13-14; U S West Opposition at 2 (characterizing parties' positions as an "industry consensus" on this issue).

[54] CompTel Petition at 11-12; WilTel Petition at 11-13. *Accord*, BellSouth Opposition at 18; Sprint Opposition at 15.

36. USTA proposes that the use of the fiber/copper mix as a surrogate for the actual DS3/DS1 circuit mix be a permissible option, but not mandatory, for the LECs.[55] Rochester opposes use of the fiber/copper mix, arguing that current DS1 rates reflect the mix of copper and fiber interoffice facilities used for DS1 services, and that use of the fiber/copper mix as a surrogate would distort the manner in which LECs use their networks and would introduce further inefficiencies into the pricing of transport.[56]

37. OPASTCO argues that small LECs should be allowed to include voice grade direct-trunked transport rates in the calculation of tandem-switched transport rates.[57] Sprint agrees in cases where the LEC uses only voice grade facilities, but argues that if the LEC uses any DS1 facilities for tandem-switched transport, it should use the DS1 direct-trunked transport rate with a 9000 minutes per month per circuit loading factor.[58]

38. *Discussion.* On reconsideration, we find that it may be impractical for the LECs to base their tandem-switched transport rates on the actual number of DS3s and DS1s in the tandem-to-end office link. First, the LECs generally have not measured the number of DS3s and DS1s in their interoffice network, and to do so now would be burdensome, raising difficult measurement questions. Second, it appears that most LECs do not account for tandem-to-end office links separately from interoffice facilities generally. No party has identified any alternative surrogate that better serves our objectives of accuracy, verifiability, and administrative ease than the fiber/copper mix, which is objectively verifiable through Tier 1 LECs' reports to the ARMIS database. Accordingly, we clarify that LECs' initial tandem-switched transport rates will be presumed reasonable if they are derived using the fiber/copper mix of interoffice switched transport facilities reported through ARMIS as a surrogate for the actual mix of DS3s and DS1s.[59]

39. With respect to small LECs that file direct-trunked transport rates, we reaffirm that initial tandem-switched transport rates will be presumed reasonable if based on DS1 and DS3 direct-trunked transport rates. Non-Tier 1 LECs, however, do not report, and may not track, the relative use of fiber and copper in their interoffice networks. For such LECs, and for LECs that do not provide DS3 service, initial tandem-switched transport rates will generally be presumed reasonable if they are based on those LECs' DS1 direct-trunked transport rates. We conclude that this starting point for the interim transport rate structure is reasonable, given that most LECs that provide DS1 (but not DS3) service are likely to use DS1 facilities to provide interoffice services. Incorporating voice grade rates into tandem-switched transport rates does not appear to create significant benefits, and would reduce the ability to verify the basis for initial rates. For LECs with neither DS1 nor DS3 direct-trunked transport rates that file direct-trunked transport rates, tandem-switched transport rates will be presumed reasonable if based on voice grade direct-trunked transport rates.

2. 9000 Minutes per Circuit per Month Loading Factor

40. *Order.* We concluded that LEC tandem-switched transport rates will be presumed reasonable if derived based on a 9000 minutes per month per circuit loading factor.[60]

41. *Positions of the Parties.* According to OPASTCO and Great Plains, many of the small LECs have loading factors substantially below 9000 minutes per circuit per month. They seek flexibility to use a loading factor that reflects their actual usage.[61] AT&T supports this request as reflecting cost causation.[62] Sprint supports the request with respect to LECs that use only voice grade circuits.[63]

42. *Discussion.* The record contains no information to support a specified loading factor lower than 9000 minutes of use per circuit per month for small LECs. We decline to grant a presumption of reasonableness to LECs' actual loading factors because of the difficulty of verification and the potential for manipulation. We conclude that the benefits to be obtained from use of more individualized loading factors are outweighed by the benefits of the administrative convenience of a uniform loading factor and of avoiding verification difficulties. This conclusion applies with equal force to LECs that use only voice grade circuits. The 9000 minutes per circuit per month standard serves as a convenient starting point in the context of a short-term, interim rate structure.

3. Tandem Revenue Requirement

43. *Order.* We stated that the tandem charge subelement of tandem-switched transport will be presumed reasonable, initially, if set to recover 20% of the current Part 69 tandem revenue requirement, calculated based on the interstate allocation of Central Office Equipment (COE) Category 2 costs assigned to transport.[64]

44. *Positions of the Parties.* CompTel argues that the tandem revenue requirement should be limited to COE Category 2 costs standing alone, and requests that the Commission clarify that LECs may not load additional expenses or overhead costs into the tandem charge at their discretion.[65] U S West states that it will calculate the tandem revenue requirement by adding other Part 69 costs associated with tandem investment to COE Category 2 investment assigned to interstate transport.[66]

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[55] USTA Opposition at 17-18.
[56] Rochester Opposition at 9.
[57] OPASTCO Petition at 3-4.
[58] Sprint Opposition at 9-10.
[59] In general, we believe that the detriments of using the fiber/copper surrogate are outweighed by other advantages, including administrative simplicity. Rochester, however, is technically correct that many LECs' current DS1 rates reflect a mix of copper and fiber interoffice facilities. We will not preclude LECs from using actual DS3 and DS1 circuit counts as long as when they file their initial transport tariffs, they provide adequate support to enable us to verify their DS3 and DS1 circuit counts, including an explanation of the methodology used to develop these counts.
[60] *Order*, 7 FCC Rcd at 7036-37, ¶ 56 n.112.
[61] OPASTCO Petition at 4-5; Great Plains Petition at 6-7.
[62] AT&T Opposition at 18 n.27.
[63] Sprint Opposition at 9-10.
[64] *Order*, 7 FCC Rcd at 7017-19, 7037-38, ¶ ¶ 23-25, 59.
[65] CompTel Opposition at 9-10.
[66] U S West Petition at 16-17 n.33. U S West states that it would first subtract line information database investment from COE Category 2 investment. *Id.*

45. *Discussion.* The Commission's Part 36 separations and Part 69 access charge rules incorporate fully distributed costing approaches. Part 69 and other Commission rules do not explicitly define a methodology for a tandem revenue requirement, but such a revenue requirement can be computed in a straightforward manner by adding the same proportion of overhead to tandem investment and associated expenses as the amount of overhead loaded on the transport category as a whole. The tandem charge initially will recover only 20% of the tandem revenue requirement, in order to ease the impact of the rate structure change on IXCs that use tandem-switched transport. We clarify that, for purposes of calculating the tandem charge in the interim transport plan, the *Transport Order* contemplated the use of the Part 69 tandem revenue requirement, which embodies fully distributed costs.

D. Initial Rates for the Interconnection Charge

46. *Order.* We permitted the LECs to set the interconnection charge based on projected demand after IXC reconfigurations have occurred, but required them to take into account other demand for the same facilities in order to prevent double recovery.[67] Because of the risk that errors in projection could lead to an interconnection charge that is too high or too low,[68] we also required the LECs to file on August 1, 1994 a report comparing the projected demand used to calculate the interconnection charge with actual demand during the first six months after the implementation of the interim transport rules. We delegated to the Chief, Common Carrier Bureau, authority to examine these reports and to require any LEC to adjust its interconnection charge if there is a significant disparity between projected and actual demand.

47. *Positions of the Parties.* Several IXCs argue that rather than allowing the LECs to project IXC reconfigurations after implementation of the new transport rate structure, the Commission should require the LECs to use historical demand and configurations, expressed in units reflecting the new transport rate structure.[69] They argue that the LECs' projected demand models are unreliable and create strategic incentives for LECs to inflate the level of the interconnection charge, and that the price cap rules reject reliance on projecting or forecasting demand to compute price indexes. The IXCs and MFS argue in the alternative that at a minimum, a true-up mechanism should be used, such as an 8 accounting order upon the filing of any tariffs based on reconfigured demand projections, enabling refunds to be ordered if disparities are identified after the reports are filed.[70]

48. Most of the LECs support use of projected reconfigurations to calculate the interconnection charge.[71] They argue that use of historical demand, rather than projected demand reflecting estimated reconfiguration due to the new transport rate structure, would be inaccurate and that use of projected reconfigurations is necessary to produce an interconnection charge large enough to result in revenue neutrality. They argue that the transport rate restructure is different from a typical voluntary rate restructure under the price cap rules, in which the LEC assumes the risk that demand for the restructured rates will produce insufficient revenue, and receives the potential reward if the restructure produces additional demand growth.

49. SW Bell and other LECs argue that reports on reuse of facilities should not be required.[72] They assert that the reports are burdensome and unnecessary, that the productivity offset in the price cap rules already accounts for reuse of spare facilities, and that other factors beside the transport rate restructure could affect demand results. SW Bell also argues that if the reports are required, upward, as well as downward, adjustments to the interconnection charge should be available. AT&T, Sprint, and MFS oppose elimination of the reuse reporting requirement, arguing that reporting is necessary to combat the LECs' incentive to increase the amount of the interconnection charge, and that the price cap productivity offset does not adequately account for the extraordinary amount of facility reuse that could result from the transport rate restructure.[73]

50. Unlike the other LECs, Ameritech states that it will set the interconnection charge based on historical demand expressed in units reflecting the new transport rate structure, without trying to recoup the cost of any excess capacity created by IXC network reconfigurations.[74] Ameritech argues that LECs using historical demand, as it intends to do, should be exempt from the reporting requirement and from any reduction of the interconnection charge designed to estimate reuse of facilities.

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[67] *Order*, 7 FCC Rcd at 7039-40, ¶ ¶ 63-64.

[68] In the *Order*, we directed the LECs to calculate the initial interconnection charge using the following method. First, the LECs compute the revenue they will receive from facilities-based transport charges by projecting the total amount of usage of facility-based transport elements under the new rate structure (including entrance facilities, direct-trunked transport, tandem-switched transport, and dedicated signalling transport), and multiplying by the rates for those elements. Second, the LECs subtract this revenue amount from (in the case of price cap LECs) their total revenue from transport under pre-existing rate and demand levels, or (in the case of rate-of-return LECs) their total transport revenue requirement established under the Part 69 rules, to obtain the interconnection charge revenue requirement. Third, the LECs divide the interconnection charge revenue requirement by the expected total number of minutes of use of the LEC interstate switched access network to derive a per-minute interconnection charge. Under this formula, erroneous LEC projections of IXC reconfigurations in response to the interim structure could cause the interconnection charge to be too high (or too low). For example, if a LEC projects too great a reduction of trunk use by IXCs, then the total facilities-based transport charge revenue projection would be too low, the interconnection charge revenue requirement would be too high, and thus the interconnection charge would be too high.

[69] AT&T Petition at 13-16; CompTel Petition at 20-22. *Accord*, MCI Opposition at 16-17.

[70] AT&T Petition at 17; CompTel Petition at 23; Sprint Opposition at 16; MFS Opposition at 12.

[71] Bell Atlantic Opposition at 4; BellSouth Opposition at 9-10; GTE Opposition at 22; NYNEX Opposition at 9-10; Pacific Opposition at 16; Pacific Reply at 7; SW Bell Opposition at 2-4; United Opposition at 2-5; U S West Opposition at 4-6 (although expressing willingness to derive the interconnection charge based on current minutes of use rather than projected future usage).

[72] SW Bell Petition at 7-11; BellSouth Opposition at 10, 17; NYNEX Opposition at 11-12; USTA Opposition at 3-4.

[73] AT&T Opposition at 18-20; Sprint Opposition at 16-17; MFS Opposition at 12-14.

[74] Ameritech Opposition at 8-9.

51. *Discussion.* The transport rate restructure was intended in part to encourage more efficient IXC network reconfigurations. We did not intend that the LECs would lose substantial amounts of revenue as a result of these reconfigurations. Indeed, the initial interconnection charge is to be calculated on a residual basis. The question is how best to implement that decision. Because of LEC incentives to project reconfigurations in a manner that would maximize the interconnection charge, and because of the difficulty of evaluating those projections, we conclude that the LECs should be required to use historical facility demand in computing the initial interconnection charge. In order to ensure that the transport rate restructure results in an interconnection charge that is neither inadequate nor excessive, however, we are permitting LECs to seek midcourse adjustments to the interconnection charge, based in part on reports on actual demand results. In addition, in order to achieve revenue neutrality with a minimum of rate churn, we require the LECs to use projections of the number of switched minutes by which the interconnection charge revenue requirement will be divided in computing the initial interconnection charge.[75]

52. Two major variables will affect the magnitude of the interconnection charge: the amount of transport facilities (direct trunks, entrance facilities, and tandem-switched minutes) to which the facility-based transport rates will apply, and the total number of switched minutes by which the interconnection charge revenue requirement will be divided.[76] The amount of facilities is relatively difficult to project because of the possibility that IXCs will reconfigure to use fewer trunks once the interim transport rate structure is implemented. In the *Transport Order,* we decided to allow the LECs to use projections, but to require them to report on the reuse of facilities that IXCs have stopped using due to network reconfigurations resulting from the transport rate restructure, in order to avoid double recovery.[77] After considering the arguments in the record and analyzing further the process that would be necessary to assure that use of projected facility demand did not result in a windfall for the LECs, we conclude that it is in the public interest to require the LECs to use historical facility demand to set the initial interconnection charge, combined with an opportunity to adjust the charge later if actual facilities demand is significantly less than historical demand.[78] In such cases, by assuming that LECs would immediately reuse all facilities freed due to IXC network reconfiguration, this approach will place the burden on LECs to produce the information necessary to demonstrate the extent to which they have not been able to reuse such facilities. In addition, because the LECs would not be guaranteed recovery of such costs through the interconnection charge, this approach provides the LECs with incentives to reuse facilities efficiently. The opportunity to true up later, if carriers can demonstrate that their actual experience is significantly less than the historical levels on which the rate is based, should protect carriers from unreasonable under-recovery.

53. For these reasons, we modify the *Order* 's provisions, and require the LECs to set the interconnection charge in their h initial transport tariffs based on historical demand for transport facilities, expressed in units (*i.e.*, numbers of entrance facilities, direct trunks, and tandem-switched minutes) reflecting the new transport rate structure. We retain our conclusion that the transport rate restructure should be revenue neutral, however. Thus, we will permit a midcourse adjustment to the interconnection charge to ensure revenue neutrality if a LEC can demonstrate that: (1) actual demand for interstate transport facilities is significantly less than from the historical demand used to set the interconnection charge due to IXC network reconfigurations resulting from the transport rate restructure;[79] and (2) the LEC has not been able to put its facilities to alternative uses.

54. Unlike the difficult process of forecasting IXC facility reconfigurations due to the transport rate restructure, we conclude that projecting the number of interstate switched minutes based on historical trends in minute growth is a relatively straightforward process with which the LECs and Commission staff have ample experience. The historical trend of increased annual growth in minutes is unlikely to be affected significantly by the transport rate restructure. Moreover, given the historical growth trends, requiring the LECs to use historical minutes would almost certainly understate the minutes of use LECs can reasonably expect and thereby overstate the interconnection charge, followed by rate churn if the charge were lowered to achieve rev-

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[75] Given the experience that the industry, as well as Commission staff, has with switched access minute trends, these projections are likely to be more reliable than projections of IXC reconfigurations in response to our transport rule changes.

[76] *See supra* note 68.

[77] If LECs can reuse facilities that are no longer needed for interstate switched transport once IXCs reconfigure their network usage, the LECs should not be allowed to recover the costs of these facilities through the interconnection charge, because they can recover such costs from the new uses. *See Order,* 7 FCC Rcd at 7039-40, ¶ 63. We disagree with the LECs' argument that the productivity offset in the price cap rules already accounts for reuse of spare facilities. Unlike the price cap productivity offset, which accounts for LEC efficiency in the ordinary course of business, the potential reduction of demand for LEC facilities and the associated potential for reuse of those facilities due to the transport rate restructure would arise from an overall change in the regulatory environment.

[78] In addition, we require that the tandem charge be calculated based on historical demand. In the *Transport Order,* we directed LECs to calculate the tandem charge using projected demand after IXC reconfigurations have taken place, just as they were to use projected demand for the interconnection charge. *Order,* 7 FCC Rcd at 7038, ¶ 59. As we now conclude that the LECs should use historical demand to set the interconnection charge, we also conclude that the tandem charge should be calculated based on the historical number of minutes of access tandem use. We delegate authority to the Chief, Common Carrier Bureau, to require an adjustment to the tandem charge if the actual number of minutes of access tandem use is significantly different from the historical number of minutes, and if this results in a substantial difference in the level of the charge.

[79] Thus, the LEC must show that the loss of demand is not due to competition from other access providers. The interconnection charge should not compensate LECs for the loss of demand for facility-based transport services due to competition, particularly if we adopt our proposal to require switched expanded interconnection. In the newly competitive transport market that we proposed to facilitate in the *Expanded Interconnection Second Notice,* the LECs would not be shielded from the risks of revenue loss due to the growth of competition. *See Expanded Interconnection Order,* 7 FCC Rcd at 7430, 7436, ¶ ¶ 129, 144.

enue neutrality. We therefore retain our requirement that the LECs use projections of the number of minutes in computing the initial interconnection charge. We also retain our requirement that the LECs file reports on actual demand results.[80] If a LEC's projection of the number of minutes is substantially below actual minutes, we would require the LEC to reduce the interconnection charge. We would also permit appropriate increases in the interconnection charge if a LEC's 8 projection of the number of minutes is substantially greater than actual minutes.

55. We believe that the reports can be provided -- and the necessary showings to justify any mid-course adjustments to ensure revenue neutrality can be made -- as soon as valid information is available regarding the extent of IXC reconfigurations. Thus, instead of requiring the LECs to submit such reports in August 1994 (as provided in the *Order)*, we delegate authority to the Chief, Common Carrier Bureau, to specify the timing, as well as the format, of the reports. LECs seeking an increase in the interconnection charge will bear the burden of showing that their actual facility use is significantly lower than the historical levels on which the charge is based, and that they have not been able to put their facilities to alternative uses.[81] Such LECs should also provide information to verify that the interconnection charge does not compensate them for losses of demand due to competition.[82]

IV. IMPLEMENTATION PROCEDURES

A. Ratcheting Procedures

56. *Positions of the Parties.* Sprint and MCI ask for clarification of how various charges should be assessed when LECs ratchet switched and special access traffic over the same facilities. Sprint recommends that LECs be required to pro-rate flat DS3 transport charges, rather than being permitted to charge for the switched access capacity on the basis of the number of DS1 channels used.[83] NYNEX and USTA, the only LEC representatives to address this recommendation, generally support it.[84] NYNEX notes that ratcheting should be applied separately for each rate element to the extent that the facility provided under that rate element is shared between switched and special access traffic; Sprint agrees.[85]

57. *Discussion.* One of the goals of this proceeding is to stimulate efficient use of the LECs' transport network by moving to pricing approaches that provide appropriate economic incentives. In the *Expanded Interconnection Order*, we concluded that "ratcheting arrangements are reasonable means of permitting customers flexibility in structuring their leased special access networks, and allowing the LECs to engineer their access networks efficiently using higher capacity facilities.[86] We conclude that when a customer uses a given facility for both special access and switched transport traffic, it should pay a mix of the rates from the special access and transport tariffs for facilities at that level of capacity. For example, when a customer uses a given DS3 for both special access and switched transport traffic, it should pay a mix of the DS3 rates from the special access and transport tariffs.[87] While Sprint's specific recommendation is one approach that would be consistent with our conclusion, we decline at this time to require LECs to implement a specific pricing plan for ratcheting. In the tariff review process, we will assess LEC proposals for pricing dedicated facilities carrying both switched and special access traffic of a single customer.

B. Implementation by Small LECs

58. *Order.* We required all LECs to implement the interim rate structure. Centralized equal access providers and LECs participating in such arrangements are exempted from offering direct-trunked transport. LECs need not offer direct-trunked transport to end offices that lack the necessary measurement and recording functions.[88]

59. *Positions of the Parties.* OPASTCO and Great Plains, a small LEC, argue that the interim transport rate structure and pricing plan should be optional for small LECs because many of them do not face the competitive pressures and demand for direct trunking that Tier 1 LECs face, and thus the interim plan would impose substantial burdens that would not be offset by any benefits.[89] Sprint and Rochester support the small LECs' request.[90] AT&T asserts that IXCs should be able to obtain direct-trunkedx transport from small LECs where they have end office measurement capabilities, but that a reasonable accommodation of both LEC and IXC interests could permit non-Tier 1 LECs to file restructured transport tariffs only in the event of a *bona fide* request for direct-trunked transport.[91]

60. *Discussion.* Requiring all non-Tier 1 LECs to implement the interim transport rate structure appears to generate more costs than benefits. Small LECs are likely to face little demand for direct-trunked transport. On the other hand, IXCs that wish to buy direct-trunked transport from small LECs should be able to do so. Accordingly, we reconsider the requirement in the *Order* that all LECs implement the interim rate structure, and instead require that non-Tier 1 LECs file tariffs for direct-trunked trans-

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[80] Ameritech requested that LECs using historical demand to set the interconnection charge be exempted from the reporting requirement. We are, however, imposing the reporting requirement on all LECs, because of the possible need for adjustments to the interconnection charge due to erroneous projections of the number of minutes.

[81] LECs may submit justifications based on surrogates or studies, provided that they use reasonable methodologies.

[82] We would consider the demand for cross-connect elements under switched expanded interconnection to be a reasonable starting point for determining loss of demand for LEC switched transport facilities due to competition, because competitive providers of the transport component of switched access cannot bypass the LEC network entirely, but must use LEC switched expanded interconnection.

[83] Sprint Petition at 16-18. *Accord*, MCI Opposition at 10.

[84] NYNEX Opposition at 16; USTA Opposition at ___.

[85] NYNEX Opposition at 16; Sprint Reply at 8.

[86] *Expanded Interconnection Order*, 7 FCC Rcd at 7463, ¶ 199.

[87] In addition to the facility-based rates, the customer would pay the interconnection charge applicable to the switched transport minutes traversing such a facility.

[88] *Order*, 7 FCC Rcd at 7049-51, ¶ ¶ 90-94.

[89] OPASTCO Petition at 5-15; Great Plains Petition at 2-4.

[90] Sprint Opposition at 8; Rochester Opposition at 12-13.

[91] AT&T Opposition at 16-18.

port upon receipt of a *bona fide* request for direct-trunked transport. We retain our requirement that all LECs providing entrance facilities must do so on a flat-rate basis.[92]

C. Jurisdictional Allocation

61. Several LECs seek guidance on how LECs are to allocate transport facilities between jurisdictions under the interim structure.[93] They suggest that we clarify that during the period that the interim transport rules are effective, LECs should continue to use percentages of interstate use (PIUs) to allocate transport between the interstate and state jurisdictions, and that the 10% rule applicable to special access should not apply to transport at this time. We clarify that PIUs should continue to be used to allocate transport facilities between jurisdictions.

D. Resale of Transport

62. CompTel seeks clarification that IXCs may purchase direct-trunked transport from LECs and then resell that capacity to (or share it with) other IXCs, asserting that this would be consistent with the Commission's existing prohibition against restrictions on resale and that resale would provide some additional competitive discipline.[94] We affirm that LECs may not impose resale restrictions on any access services subject to our jurisdiction, including interstate switched transport.

E. Rule Changes

63. *Positions of the Parties.* USTA seeks clarification of the rule on dedicated signalling transport, pointing out that the rule calls for adjustment on July 1, 1993 similar to that for other transport elements, while the text indicates that changes are not required for LECs with tariffs already in place.[95] U S West argues that the text of the *Order* calculates the tandem subelement based on 20% of the *current* tandem revenue requirement, while the rule calculates the subelement based on the *projected* annual tandem revenue requirement.[96] USTA and U S West also argue that a number of rules govern rate development on an ongoing basis, rather than (as provided in the *Order*) controlling initial rates while subsequent rates are computed under price caps for price cap LECs.[97]

64. *Discussion.* In addition to the rule changes discussed elsewhere in this Order, we are correcting § 69.111(e) to clarify that the tandem charge should recover 20% of the *current* tandem revenue requirement, and we are revising § 69.125(b)(1) to clarify that LECs with tariffs in place for dedicated signalling transport need not modify the rates in those tariffs.[98] Moreover, we are correcting § 69.1(c) (and making conforming changes in certain other rules) to clarify that LECs subject to the price cap rules may adjust their rates pursuant to the price cap guidelines adopted in the *Order*.[99]

F. Impact Estimates

65. In the 1992 *Transport Order*, we adopted the interim transport rate structure and pricing rules based on the policy considerations discussed in that Order. We also had data provided by the seven regional Bell Operating Companies (BOCs) and GTE estimating the impact of our interim rate structure and pricing rules on IXCs' total switched access costs.[100] We have made a number of potentially significant modifications to the interim rate structure and pricing rules in this Order, and we desire to obtain revised estimates of the projected impacts on classes of access customers to assess whether significant unexpected changes are likely to result from these modifications. Accordingly, we require each of the BOCs and GTE to submit revised impact estimates, as well as estimates of the proportion of transport revenue to be recovered through the interconnection charge. These revised estimates should be based on the same modeling methodologies and assumptions that were used to derive the impact estimates considered in the 1992 *Order*,[101] except that they should reflect customers' most up-to-date network configurations, the decisions in this Order, and the recent Commission decisions on general support facilities costs and the price cap index for 1993.[102] Such modeling methodologies and assumptions forming the basis of each carrier's impact analysis should be clearly stated. This information should be provided in the same format as the data provided in 1992, within 14 days after the LECs file their initial transport tariffs.[103]

G. Information for Planning Purposes

66. Some IXCs have requested information so that they can better assess the impact of the transport restructure and plan for any reconfiguration.[104] We believe that provision of information specific to individual IXCs by the largest LECs would be useful in enabling IXCs to make plans regarding their network configurations in light of the new transport rate structure. Accordingly, we require each of the BOCs and GTE[105] to provide to each switched access customer information on the bill the customer would have

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[92] As requested by Minnesota Equal Access, we clarify that the *Order* requires those LECs that provide entrance facilities to do so on a flat rate basis, but does not apply to carriers that do not provide entrance facilities, such as centralized equal access providers. Minnesota Equal Access Petition at 3, 5-9.

[93] U S West Petition at 18-19; NYNEX Opposition at 14-15; USTA Opposition at 7.

[94] CompTel Petition at 15-16.

[95] USTA Petition, Attachment 4 at 2. *Compare* 47 C.F.R. § 69.125(b)(1) with *Order*, 7 FCC Rcd at 7052-53, ¶ 100.

[96] U S West Petition at 16. *Compare* 47 C.F.R. § 69.111(e) with *Order*, 7 FCC Rcd at 7037-38, ¶ 59.

[97] USTA Petition, Attachment 4 at 1-2; U S West Petition at 16.

[98] 7 FCC Rcd at 7052-53, ¶ 100.

[99] *Order*, 7 FCC Rcd at 7043-44, 7046, 7053, ¶ ¶ 74-76, 82, 102.

[100] *Order*, 7 FCC Rcd at 7042, ¶ 69. *See also Order*, 7 FCC Rcd at 7040-42, 7085-98, ¶ ¶ 65-68 & App. C.

[101] As Pacific's model was rejected in the 1992 *Order*, *see Order*, 7 FCC Rcd at 7093-94, App. C, we will only consider Pacific's data if it uses a modeling methodology that is consistent with the models used by the other BOCs and GTE.

[102] *Amendment of the Part 69 Allocation of General Support Facility Costs*, Report and Order, CC Docket No. 92-222, 8 FCC Rcd 3697 (1993); *1993 Annual Access Tariff Filings*, Memorandum Opinion and Order Suspending Rates and Designating Issues for Investigation, CC Docket No. 93-193, DA 93-762 (Com. Car. Bur., released June 23, 1993).

[103] Since this requirement applies to fewer than 10 entities, it is not subject to the requirements of the Paperwork Reduction Act.

[104] *See, e.g.*, CompTel Petition at 23-24.

[105] We encourage other LECs to provide similar information, but we do not require them to do so at this time.

paid for a sample recent month (*e.g.*, July 1993) had the interim transport rate structure and pricing system been in effect, as well as the customer's actual bill for that month for comparison purposes. If any of these LECs is unable to provide such comparative billing information, it must present convincing evidence to the Common Carrier Bureau demonstrating why it is unable to do so, and must provide to each switched access customer information that will enable the customer to predict how its bills are likely to change. In addition, LECs providing comparative billing information must either file with the Commission aggregate data summarizing the information provided to individual IXCs, broken down by large, medium, and small IXCs, or present convincing evidence to the Common Carrier Bureau demonstrating why it is unable to do so. All of the information discussed in this paragraph should be provided within 21 days after the LECs file their initial transport tariffs.[106]

V. CONCLUSION

67. This Order provides guidance on critical issues, and should facilitate the filing and review of the LECs' initial restructured transport tariffs. In particular, we are clarifying the application of the interim rate structure to particular configurations, the derivation of initial transport rates, and implementation procedures. At this time, we are not addressing proposals that would fundamentally change the balance struck in our *Transport Order*.

VI. ORDERING CLAUSES

68. Accordingly, IT IS ORDERED that pursuant to authority contained in Sections 1, 4(i) and (j), 201-205, 218, 220, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), 201-205, 218, 220, and 403, Part 69 is AMENDED as set forth in Appendix C.

69. IT IS FURTHER ORDERED that the petitions for reconsideration and clarification concerning the rate structure and pricing of local transport ARE GRANTED to the extent discussed herein.

70. IT IS FURTHER ORDERED that the decisions and rules adopted herein SHALL BE EFFECTIVE on September 1, 1993.

71. IT IS FURTHER ORDERED that the date on which local exchange carriers are required to file tariff revisions incorporating the new transport rate structure and pricing rules IS REVISED from August 2, 1993 to September 1, 1993. The effective date of these tariff revisions should be December 1, 1993.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[106] Since this requirement applies to fewer than 10 entities, it is not subject to the requirements of the Paperwork Reduction Act.

Appendix A: List of Parties

Parties Filing Petitions for Reconsideration ("Petition") December 21, 1992

American Telephone and Telegraph Company (AT&T)

Ameritech Operating Companies (Ameritech)

Bell Atlantic

BellSouth Telecommunications, Inc. (BellSouth)

Cincinnati Bell Telephone Company (Cincinnati Bell)

Competitive Telecommunications Association (CompTel)

GTE Service Corporation and its affiliated domestic telephone operating companies (GTE)

Great Plains Communications, Inc. (Great Plains)

MCI Telecommunications Corporation (MCI)

Minnesota Equal Access Network Services, Inc. (Minnesota Equal Access)

New York Telephone Company and New England Telephone and Telegraph Company (NYNEX)

Organization for the Protection and Advancement of Small

Telephone

Companies (OPASTCO)

Pacific Bell (Pacific)

Rochester Telephone Corporation (Rochester)

Southern New England Telephone Company (SNET)

Southwestern Bell Telephone Company (SW Bell)

Sprint Communications Company (Sprint)

U S West Communications, Inc. (U S West)

United States Telephone Association (USTA)

United Telephone Companies (United)

WilTel, Inc. (WilTel)

Parties filing Comments on or Oppositions to Petitions for Reconsideration ("Opposition") February 12, 1993

Ad Hoc Telecommunications Users Committee (Ad Hoc) (filed Feb. 16, 1993)

Allnet

Ameritech

AT&T

Bell Atlantic
BellSouth
CompTel
GTE
MCI
MFS
NYNEX
Pacific
Rochester (filed Feb. 1, 1993)
Sprint
SW Bell
United
U S West
USTA
WilTel

Parties Filing Replies to Oppositions to Petitions for Reconsideration ("Reply") February 25, 1993

Ameritech
AT&T
Bell Atlantic
BellSouth
CompTel
GTE
MCI
MFS
Minnesota Equal Access
NYNEX
Pacific (filed Feb. 22, 1993)
Rochester
Sprint
SW Bell
United
U S West
USTA
WilTel

Parties Filing Comments in Response to Public Notice, DA 93-370 ("Comments on Public Notice") April 14, 1993

CompTel
GVNW, Inc./Management (GVNW)
MCI
Rochester
Sprint
United and Central Telephone Companies (United)
USTA
WilTel

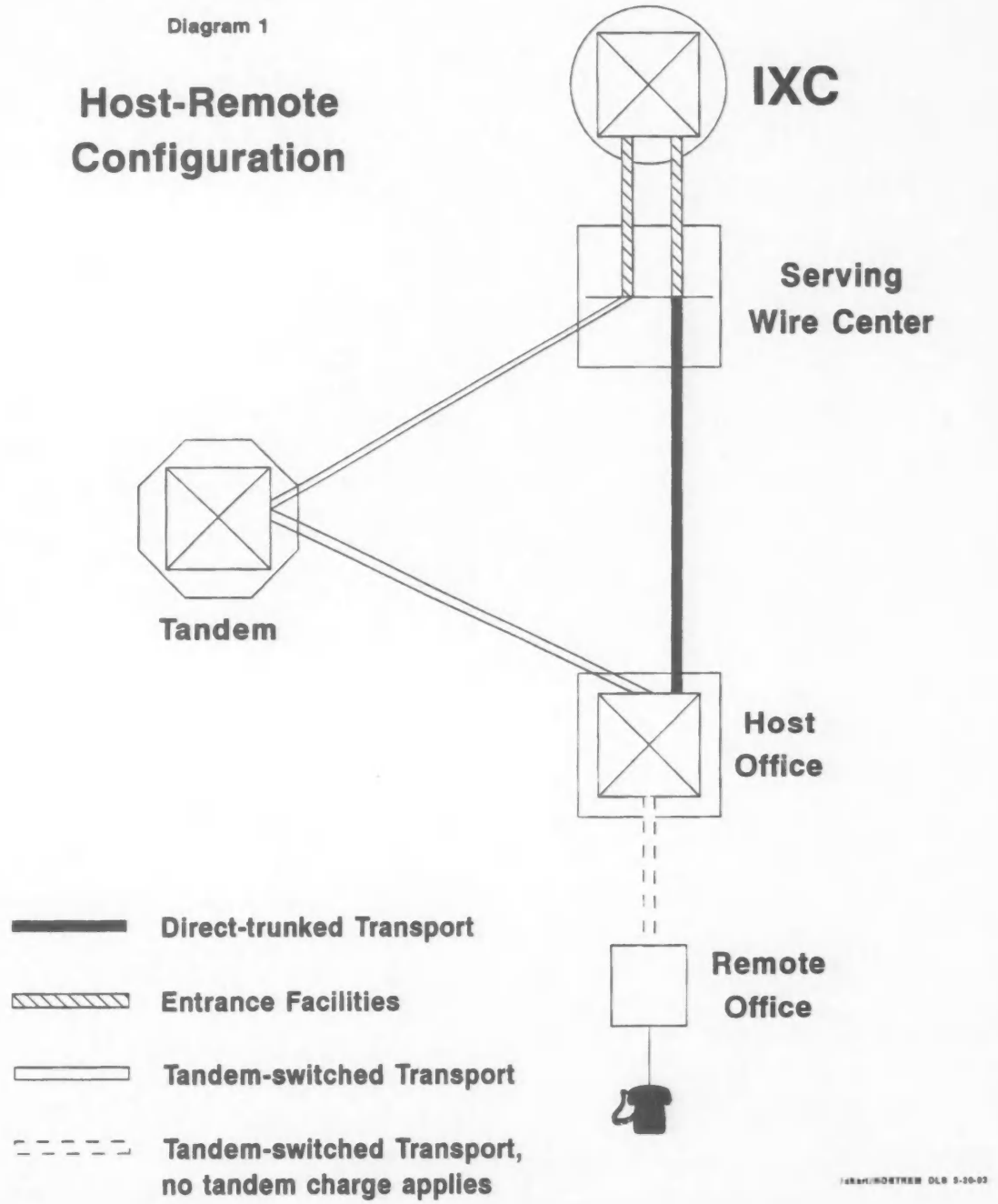
Parties Filing Reply Comments in Response to Public Notice, DA 93-370 ("Reply Comments on Public Notice") April 26, 1993

Rochester
Sprint
United

APPENDIX B

Diagram 1

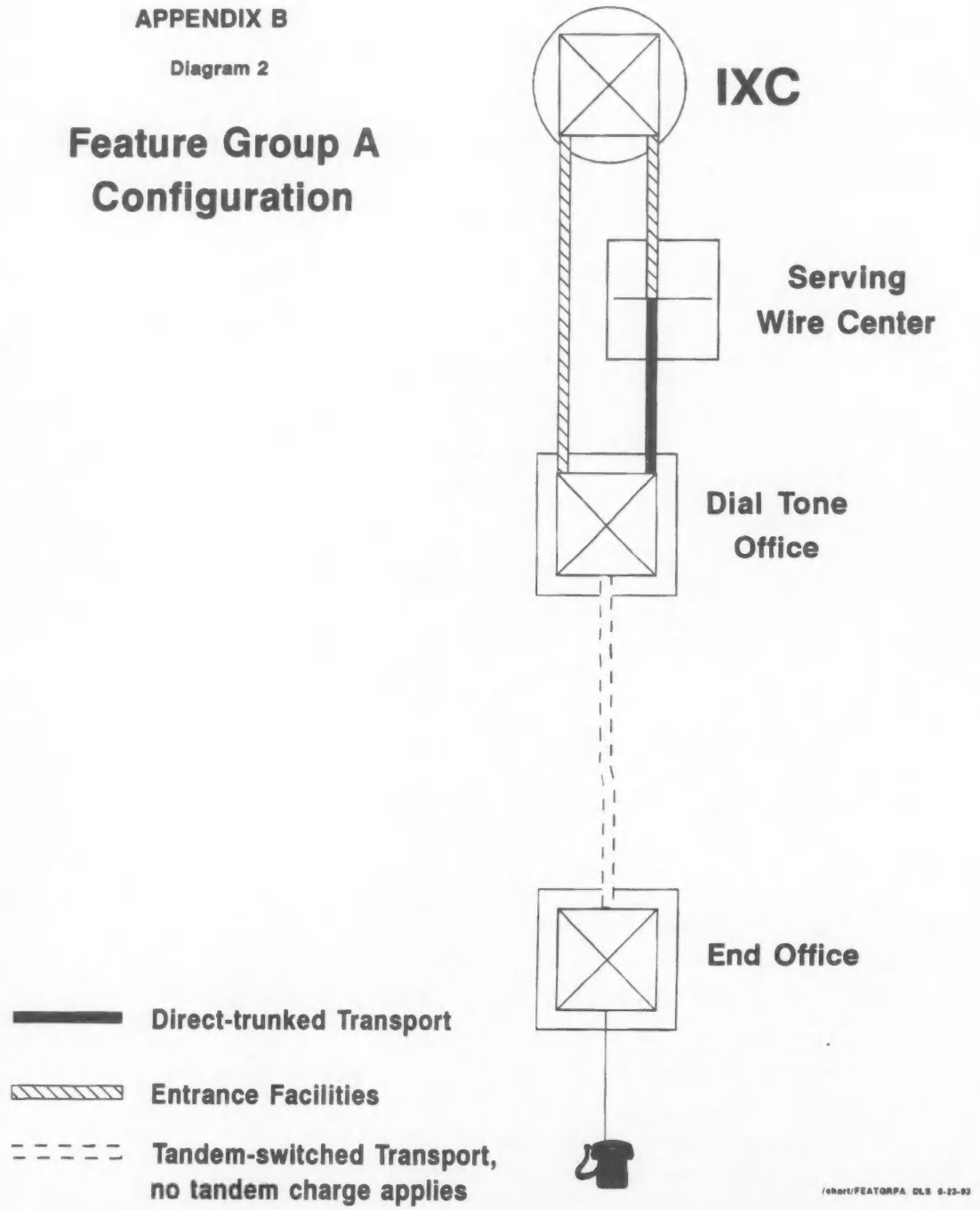
Host-Remote Configuration



APPENDIX B

Diagram 2

Feature Group A Configuration



Appendix C: Rule Changes

PART 69 -- ACCESS CHARGES

Part 69 of Title 47, Code of Federal Regulations, is amended as follows:

1. The authority citation for Part 69 continues to read as follows:

AUTHORITY: Secs. 4, 201, 202, 203, 205, 218, 403, 48 Stat. 1066, 1070, 1072, 1077, 1094, as amended, 47 U.S.C. 154, 201, 202, 203, 205, 218, 403.

2. Section 69.1 is amended by revising paragraph (c) to read as follows:

§ 69.1 Application of access charges.

* * * * *

(c) The following provisions of this part shall apply to telephone companies subject to price cap regulation only to the extent that application of such provisions is necessary to develop the nationwide average carrier common line charge, for purposes of reporting pursuant to §§ 43.21 and 43.22, and for computing initial transport rates: §§ 69.3(f), 69.105(b)(4), 69.105(b)(5), 69.106(b), 69.107(b), 69.107(c), 69.109(b), 69.110(d), 69.111(c), 69.111(g), 69.112(d), 69.114(b), 69.114(d), 69.125(b)(2), 69.205(e), 69.301 through 69.310, and 69.401 through 69.412. The computation of rates pursuant to these provisions by telephone companies subject to price cap regulation shall be governed by the price cap rules set forth in part 61 of this chapter and other applicable Commission Rules and orders.

3. Section 69.2 is amended by revising paragraphs (oo) and (ss), and adding paragraphs (tt) and (uu), to read as follows:

§ 69.2 Definitions.

* * * * *

(oo) "Direct-Trunked Transport" means transport on circuits dedicated to the use of a single interexchange carrier or other person, without switching at the tandem, (1) between the serving wire center and the end office, or (2) between two customer-designated telephone company offices.

* * * * *

(ss) "Tandem-Switched Transport" means transport of traffic that is switched at a tandem switch (1) between the serving wire center and the end office, or (2) between the telephone company office containing the tandem switching equipment, as described in § 36.124 of this chapter, and the end office. Tandem-switched transport between a serving wire center and an end office consists of circuits dedicated to the use of a single interexchange carrier or other person from the serving wire center to the tandem (although this dedicated link will not exist if the serving wire center and the tandem are located in the same place) and circuits used in common by multiple interexchange carriers or other persons from the tandem to the end office.

(tt) "Initial transport rates" means rates for entrance facilities, direct-trunked transport, tandem-switched transport, dedicated signalling transport, and the interconnection charge in tariffs filed on September 1, 1993 pursuant to the Report and Order in Transport Rate Structure and Pricing, CC Docket No. 91-213, FCC 92-442, 7 FCC Rcd 7006 (1992).

(uu) "Price cap regulation" means the method of regulation of dominant carriers provided in §§ 61.41 through 61.49 of this chapter.

4. Section 69.108 is amended by revising paragraphs (a), (b), and (c) to read as follows:

§ 69.108 Transport rate benchmark.

(a) For transport charges computed in accordance with this subpart, the DS3-to-DS1 benchmark ratio shall be calculated as follows: the telephone company shall calculate the ratio of (1) the total charge for a one mile channel termination, ten miles of interoffice transmission, and one DS3 multiplexer using the telephone company's DS3 special access rates to (2) the total charge for a one mile channel termination plus ten miles of interoffice transmission using the telephone company's DS1 special access rates.

(b) Initial transport rates will generally be presumed reasonable if they are based on special access rates with a DS3-to-DS1 benchmark ratio of 9.6 to 1 or higher.

(c) If a telephone company's initial transport rates are based on special access rates with a DS3-to-DS1 benchmark ratio of less than 9.6 to 1, those initial transport rates will generally be suspended and investigated absent a substantial cause showing by the telephone company. Alternatively, the telephone company may adjust its initial transport rates so that the DS3-to-DS1 ratio calculated as described in (a) of those rates is 9.6 or higher. In that case, initial transport rates that depart from existing special access rates effective on September 1, 1992 so as to be consistent with the benchmark will be presumed reasonable only so long as the ratio of projected revenue recovered through the interconnection charge to the projected revenue recovered through facilities-based charges is the same as it would be if the telephone company's existing special access rates effective on September 1, 1992 were used.

5. Section 69.110 is amended by revising paragraph (d) and adding paragraph (e) to read as follows:

§ 69.110 Entrance Facilities.

* * * * *

(d) Telephone companies shall apply only their shortest term special access rates in setting entrance facilities charges.

(e) Telephone companies shall not offer entrance facilities based on term discounts or volume discounts for multiple DS3s or any other service with higher volume than DS3 through October 31, 1995.

6. Section 69.111 is amended by redesignating paragraphs (c), (d), (e), and (f), as paragraphs (e), (f), (g), and (h), respectively; revising paragraphs (b), (e) (former paragraph (c)), (g) (former paragraph (e)), and (h) (former paragraph (f)); and adding paragraphs (c) and (d), to read as follows:

§ 69.111 Tandem-switched transport and tandem charge.

* * * * *

(b) A tandem-switched transmission charge expressed in dollars and cents per access minute shall be assessed upon all interexchange carriers and other persons that use telephone company tandem-switched transport facilities through October 31, 1995.

(c) Tandem-switched transport transmission charges generally shall be presumed reasonable if the telephone company bases the charges on a weighted per-minute equivalent of direct-trunked transport DS1 and DS3 rates that reflects the relative number of DS1 and DS3 circuits used in the tandem to end office links (or a surrogate based on the proportion of copper and fiber facilities in the interoffice network), calculated using a loading factor of 9000 minutes per month per voice-grade circuit. Tandem-switched transport transmission charges that are not presumed reasonable generally shall be suspended and investigated absent a substantial cause showing by the telephone company.

(d) Tandem-switched transport transmission charges may be distance-sensitive. Mileage shall be measured as airline mileage between the serving wire center and the end office, unless the '& customer has ordered tandem-switched transport between the tandem office and the end office, in which case mileage shall be measured as airline mileage between the tandem office and the end office.

(e) If the telephone company employs distance-sensitive rates:

(1) a distance-sensitive component shall be assessed for use of the transmission facilities, including intermediate transmission circuit equipment between the end points of the interoffice circuit; and

(2) a nondistance-sensitive component shall be assessed for use of the circuit equipment at the ends of the interoffice transmission links.

* * * * *

(g) Through October 31, 1995, the tandem charge shall be set to recover twenty percent of the annual Part 69 interstate tandem revenue requirement.

(h) All telephone companies shall provide tandem-switched transport service.

7. Section 69.112 is amended by redesignating paragraph (e) as paragraph (f), and by revising paragraphs (b)(1), (b)(2), (c), (d), and (f) (former paragraph (e)), and adding paragraph (e) to read as follows:

§ 69.112 Direct-Trunked transport.

* * * * *

(b)(1) For telephone companies subject to price cap regulation, initial direct-trunked transport charges based on the interoffice charges for equivalent voice grade, DS1, and DS3 special access services as of September 1, 1992, adjusted for changes in the price cap index calculated for the July 1, 1993 annual filing for telephone companies subject to price cap regulation, generally shall be presumed reasonable if the benchmark defined in § 69.108 is satisfied. Direct-trunked transport charges may be distance-sensitive. Mileage shall be measured as airline mileage between customer-designated points.

(b)(2) For telephone companies not subject to price cap regulation, initial direct-trunked transport charges based on the interoffice charges for equivalent voice grade, DS1, and DS3 special access services generally shall be presumed reasonable if the benchmark defined in section 69.108 is satisfied. Direct-trunked transport charges may be distance-sensitive. Mileage shall be measured as airline mileage between customer-designated points.

(c) If the telephone company employs distance-sensitive rates:

(1) a distance-sensitive component shall be assessed for use of the transmission facilities, including intermediate transmission circuit equipment, between the end points of the circuit; and

(2) a nondistance-sensitive component shall be assessed for use of the circuit equipment at the ends of the transmission links.

(d) Telephone companies shall apply only their shortest term special access rates in setting direct-trunked transport rates.

(e) Telephone companies shall not offer direct-trunked transport rates based on term discounts or volume discounts for multiple DS3s or any other service with higher volume than DS3 through October 31, 1995.

(f) Centralized equal access providers as described in Transport Rate Structure and Pricing, CC Docket No. 91-213, FCC 92-442, 7 FCC Rcd 7002 (1992), are not required to provide direct-trunked transport service. Telephone companies that do not have measurement and billing capabilities at their end offices are not required to provide direct-trunked transport services at those end offices without measurement and billing capabilities. Telephone companies that are not classified as Class A companies under § 32.11 of this chapter are required to provide direct-trunked transport service upon request. All other telephone companies shall provide a direct-trunked transport service.

8. Section 69.124 is amended by deleting paragraph (c) and revising paragraph (b)(1) to read as follows:

§ 69.124 Interconnection charge.

* * * * *

(b)(1) For telephone companies not subject to price cap regulation, the interconnection charge shall be computed by subtracting entrance facilities, tandem-switched transport, direct-trunked transport, and dedicated signalling transport revenues from the Part 69 transport revenue requirement, and dividing by the projected total interstate local switching minutes.

* * * * *

9. Section 69.125 is amended by redesignating the introductory text of paragraph (b) as paragraph (b)(1) and revising it, and redesignating existing paragraph (b)(1) as paragraph (b)(2) and revising it, to read as follows:

§ 69.125 Dedicated signalling transport.

* * * * *

(b) (1) A flat-rated signalling link charge expressed in dollars and cents per unit of capacity shall be assessed upon all interexchange carriers and other persons that use facilities between an interexchange carrier or other person's common channel signalling network and a telephone company signalling transfer point or equivalent facilities offered by a telephone company. Signalling link charges may be distance-sensitive. Mileage shall be measured as airline mileage between the signalling point of interconnection of the interexchange carrier's or other person's common channel signalling network and the telephone company's signalling transfer point.

(2) Signalling link rates will generally be presumed reasonable if they are based on the interoffice charges for equivalent special access services. Telephone companies that have, before the effective date of the Report and Order in Transport Rate Structure and Pricing, CC Docket No. 91-213, FCC 92-442, 7 FCC Rcd 7006 (1992), tariffed a signalling link service for signalling transport between the interexchange carrier's or other person's common channel signalling network and the telephone company's STP are permitted to use the rates that are in place.

* * * * *

10. In addition to the amendments set forth above, in 47 CFR part 69 remove the words "_____ FCC Rcd _____ (1992)" and add, in their place, the words "7 FCC Rcd 7006 (1992)" in the following places:

(a) Section 69.126; and

(b) Section 69.127.

11. In addition to the amendments set forth above, in 47 CFR part 69, remove the words "carriers subject to price cap regulation as that term is defined in § 61.3(v) of this chapter" and add, in their place, the words "telephone companies subject to price cap regulation" in the following places:

(a) Section 69.110(b)(1) (appears twice in first sentence);

(b) Section 69.124(b)(2).

12. In addition to the amendments set forth above, in 47 CFR part 69, remove the words "rate of return carriers" and add, in their place, the words "telephone companies not subject to price cap regulation" in the following place:

(a) Section 69.110(b)(2).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-261

In the Matter of

Implementation of Section 22
of the Cable Television
Consumer Protection and
Competition Act of 1992

Equal Employment Opportunities

REPORT AND ORDER

Adopted: June 24, 1993; Released: July 23, 1993

By the Commission: Commissioner Barrett issuing a statement.

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I. INTRODUCTION

1. On October 5, 1992, Congress enacted the Cable Television Consumer Protection and Competition Act of 1992.[1] By this *Report and Order*, we are amending our rules to implement the equal employment opportunity (EEO) provisions of the 1992 Cable Act.[2]

II. BACKGROUND

2. The Commission has imposed EEO standards on the broadcast and cable television industries since 1969 and 1972, respectively. Under our current EEO regulations,[3] broadcast television stations[4] and cable television operators, including satellite master antenna operators, may not discriminate in their employment practices due to gender, race, color, religion, or national origin.[5] They also must afford equal opportunity in employment to all qualified persons.[6] In addition, both broadcast television stations and cable operators must establish and maintain an equal employment opportunity program designed to provide equal opportunity for minorities and women in all aspects of their employment policies and practices. The EEO review processes for broadcast stations and cable operators are similar in that, in both cases, our primary focus is on the efforts made to recruit, hire and promote qualified minorities and women. However, the type of information relied upon in reviewing EEO programs and the frequency with which EEO reviews occur differ.

3. Broadcast television stations' EEO compliance is reviewed every five years during the license renewal process. Broadcast stations with five or more full-time employees are required to file an "Equal Employment Opportunity Program Report" (Form 396) with their renewal applications. This form requests recruitment, hiring and promotion data for the 12-month period prior to filing the renewal application. Licensees also must file an Annual Employment Report (Form 395-B) on a yearly basis.[7] When reviewing a broadcaster's EEO compliance at renewal time,[8] our 0primary focus is on the licensee's overall EEO efforts.[9] If a broadcast station is found to be in

---

[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992) (hereinafter "1992 Cable Act" or "Cable Act of 1992").

[2] *See* Appendix B for final rule changes.

[3] *See* 47 C.F.R. §73.2080 (broadcast EEO Rule) and 47 C.F.R. §76.71, *et. seq.* (cable EEO rules). Our cable EEO regulations were implemented pursuant to Section 634 of the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, Section 1 *et. seq.* 98 Stat. 2779 (1984), (hereinafter "1984 Cable Act" or "Cable Act of 1984"). *See also Report and Order*, in MM Docket No. 85-61, 102 FCC 2d 562 (1985).

[4] These requirements apply to broadcast radio stations as well.

[5] Under the 1984 Cable Act and our cable EEO rules, cable entities also may not discriminate based on age. *See* 47 U.S.C. §554(b); 47 C.F.R. §76.73(a).

[6] Protected groups for both industries are: Women, Blacks, Hispanics, Asian/Pacific Islanders and American Indians.

[7] *See* 47 C.F.R. §73.3612. These reports, which set forth the station's employment statistics by job categories, are reviewed when the station applies for renewal.

[8] We also take cognizance of any final determinations reached concerning complaints of employment discrimination against broadcasters filed with government agencies and/or courts established to enforce nondiscrimination laws. *See Memorandum of Understanding between Federal Communications Commission and the Equal Employment Opportunity Commission*, 70 FCC 2d 2320 (1978) (agreement between the FCC and the EEOC regarding the handling of employment discrimination complaints against broadcasters).

[9] This evaluation is a two-step process. Initially, we review the Form 396 information in the licensee's renewal application and compare the station's workforce, as reflected in the Form 395-B reports, with the available labor force. *See Amendment of Part 73 of Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC

compliance with our broadcast EEO Rule, renewal is granted. If, however, it is not in compliance, we may impose a variety of remedies or sanctions such as an admonition, reporting conditions, renewal for less than a full term and/or a forfeiture. If the facts so warrant, we will designate the renewal application for hearing to determine whether renewal of license should be granted or denied.[10]

4. Cable systems and headquarters units with six or more full-time employees are evaluated on an annual basis.[11] This review begins when the cable operator files its Annual Employment Report (Form 395-A) which requires responses to nine questions about the cable operator's EEO efforts[12] as well as employment, hiring and promotion data. In addition, cable operators are required to answer questions from a Supplemental Investigation Sheet (SIS) every five years.[13] This sheet requests additional information regarding recruitment efforts and job categories. The Form 395-A, along with any additional information, is reviewed using a two-step process which involves a statistical analysis of the cable system's workforce and a review of the system's responses to questions regarding its EEO program. In addition, we examineh any final determinations reached by government agencies or the courts regarding EEO complaints filed against a cable system. If a system appears to be in compliance with our cable EEO rules, it is granted certification for that year. If we find that the system is not engaging in sufficient efforts or is not attracting a diverse pool of applicants, additional inquiries are made. If, based on the Form 395-A report and responses to subsequent inquiries, it is determined that the system is not in compliance, certification is denied. When certification is denied, we may impose various remedies or sanctions, including an admonition, reporting conditions; or, where appropriate, a forfeiture.[14] Finally, in addition to the annual review and the five year investigation, we conduct selective on-site reviews of cable systems to verify their EEO programs and ensure that employees are properly classified.

5. Congress in the 1992 Cable Act found that minorities and females were not employed in significant numbers in managerial positions in the broadcast and cable television industries.[15] It, therefore, adopted the EEO provisions within the 1992 Cable Act. The 1992 Cable Act adds a new section 334 to the Communications Act, which codifies our broadcast EEO Rule as well as the EEO reporting forms as they apply to broadcast television stations.[16] In addition, the new Section 334 requires the Commission to conduct mid-term reviews of broadcast television station licensees' employment practices and to require the Commission to inform such licensees of necessary improvements in recruitment practices identified as a consequence of the review.[17] The Cable Act of 1992 amends Section 634(d)(1)[18] of the Communications Act which requires that the Commission, not later than 270 days after enactment of the 1992 Cable Act, and after notice and opportunity for hearing, "prescribe revisions in the rules under this section in order to implement the amendments made to this section by such Act."[19] The Act also amends Section 634(d)(3) of the Communications Act to require the collection of more specific employee data for 15 cable job categories.[20] In addition, the 1992 Cable Act amends Section 634(h)(1) of the Communications Act to expand the scope of the cable EEO provisions to include multichannel video programming distributors.[21]

6. On December 10, 1992, the Commission adopted a *Notice of Proposed Rule Making* (*Notice*).[22] In the *Notice*, the Commission proposed rule changes it believed appropriate to implement the EEO provisions of the 1992 Cable Act and sought comment from all interested parties on the proposed rules. Fourteen comments and eight reply comments were filed in response to the *Notice*.[23]

III. DISCUSSION

A. Mid-term Review of Broadcast Television Stations.

7. *Criteria.* In the *Notice*, the Commission noted that the Act was silent as to the criteria to be used for the mid-term review. It, therefore, proposed to adopt the standard articulated in the Conference Report which indicated that the Commission should use a statistical comparison applying its processing criteria.[24]

Rcd 3967 (1987) (*Broadcast EEO), petition for reconsideration pending; see also* 4 FCC Rcd 1715 (1989) (request for clarification of the National Association of Broadcasters). If this first step indicates that the station's EEO efforts are satisfactory, the station is accepted as having fulfilled its obligations. However, if the initial analysis indicates that a station's efforts may have been less than satisfactory, it is subjected to a second-step analysis of those areas where its efforts appear deficient.

[10] *See Broadcast EEO, supra; Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501, 506 (D.C. Cir. 1988); *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978).

[11] *See* 47 C.F.R. §76.77.

[12] These questions emulate the major requirements of Section 634(d)(2) of the Communications Act and 47 C.F.R. §76.75. *See* Appendix D.

[13] *See* 47 U.S.C. §554(e)(2); 47 C.F.R. §76.77.

[14] *See* 47 U.S.C. §554(f)(2).

[15] *See* Section 22(a)(1) of the 1992 Cable Act. *See also* House Committee on Energy and Commerce, H.R. Rep. No. 102-628, 102d Cong., 2d Sess. at 111 (1992). (hereinafter "House Report").

[16] *See* 47 U.S.C. §334(a). In its comments, the National Association for the Advancement of Colored People ("NAACP") suggests a number of significant changes to the forms 396, 395-B and our broadcast EEO Rule. *See* NAACP Comments, at 16-18, 30. The 1992 Cable Act explicitly prohibits revisions to these forms and the broadcast EEO Rule as they apply to broadcast television stations. *See also* House Committee on Energy and Commerce, H.R. Rep. No. 102-862, 102d Cong. 2d Sess. (1992) reprinted at Cong. Rec. H 8308, H 8333 (daily ed. September 14, 1992) (hereinafter "Conference Report"). Therefore, these suggested changes will not be made.

[17] *See* 47 U.S.C. §334(b).

[18] The 1992 Cable Act amends Section 634(f)(2) to raise the basic forfeiture for cable EEO violations from $200 to $500. *See* 47 U.S.C. §554(f)(2). Because our rules do not specify a forfeiture amount for cable EEO violations, (*see* 47 C.F.R. §1.80(b)) this amendment does not require a revision to our rules. NAACP suggests that, in light of Congress' intent that we increase the level of forfeitures, we should raise the base forfeiture for broadcast EEO violations from $12,500 to $32,500. *See* NAACP Comments, at 57. This proposal is beyond the scope of this rule making proceeding.

[19] 47 U.S.C. §554(d)(1).

[20] *See* 47 U.S.C. §554(d)(3)(A).

[21] *See* 47 U.S.C. §554(h)(1).

[22] *See Notice of Proposed Rule Making*, in MM Docket No. 92-261, 8 FCC Rcd 266 (1993).

[23] *See* Appendix C for a list of commenters.

[24] *See Notice*, at 267-268.

8. The National Association of Broadcasters ("NAB") supports this proposal.[25] However, NAACP and the Office of Communications of the United Church of Christ ("UCC") argue that this proposal ignores the explicit language of the Act and our longstanding EEO efforts-oriented policy.[26] The Act states that the Commission must review the employment practices of broadcast television stations.[27] UCC argues that the Conference Committee did not intend a departure from our current practice of focusing on a licensee's overall EEO efforts but, instead, sought only to freeze the processing criteria in effect as of September 1, 1992.[28] It also states that a statistical analysis, by itself, would not provide sufficient information to carry out the Act's second mandate; that is, to notify licensees of necessary improvements in recruitment practices as a consequence of the review.[29] NAB notes that the arguments made by NAACP and UCC ignore the language of the Conference Report which evidences Congress' intent that the mid-term review consist of a statistical comparison.[30]

9. We will adopt our original proposal. The Act refers to a broadcast television station's employment practices. Congress did not define this term within the statute. There are a variety of potential approaches to evaluating a licensee's employment practices. The legislative history suggests that the mid-term evaluation of a licensee's employment practices should be based on an analysis of workforce data. It states[31] that:

> It is the intent of the conferees that the Commission's Mass Media Bureau staff compare the workforce data submitted in the first two Forms 395 to be filed following the grant of a license renewal with the station's area labor force, utilizing as the geographic area for comparison that which the Commission staff would customarily use for such purposes (MSA or county), and applying the FCC EEO processing guidelines in effect on September 1, 1992.[32]

This language does not merely "freeze the processing guidelines" but instead articulates, in great detail, a specific standard which Congress intended to be used when conducting mid-term reviews. Accordingly, we will adopt our original proposal and amend our rules according to the standard discussed in the Conference Report as the basis for examining employment practices.[33]

10. *Timing of the Review.* The new Section 334(b) is silent as to specifically when the mid-term review is to occur. However, the legislative history states that the Commission should use the first two Forms 395-B that are filed after the station's licensehas been renewed.[34] In the *Notice*, the Commission proposed to use the first two Forms 395-B filed after the group expiration date of the station's license period as stated in Section 73.1020[35] of our rules.[36] NAB supports this proposal to the extent that it conforms with Congress' intent that the mid-term review occur during the normal five year license term. It urges us to review this proposal to ensure that it meets this intent.[37] We believe that our proposal does conform with Congressional intent and, we will, therefore, amend our rules accordingly.[38]

11. *Notification to Licensees.* The Act requires the Commission to notify licensees of necessary improvements in recruitment practices identified as a result of the mid-term review.[39] The legislative history states that, if the Commission's review indicates that improvement in the station's recruitment practices appears necessary, a staff letter shall be sent to the station licensee so indicating.[40] In the *Notice*, the Commission proposed to notify licensees not meeting the processing guidelines that their overall recruitment efforts might need greater attention and should be the focus of more intense self-assessment.[41] The Commission also proposed to send letters only to those licensees with identified deficiencies.[42] NAB states that the deficiency letter might include the statistical comparison conducted by the Commission and that we might assist licensees in their EEO self-assessment by referencing the provisions of the Form 396 and the broadcast EEO Rule as items that the licensee should review.[43] NAB also suggests that it would not be inappropriate for the Commission to send "non-deficiency" letters to licensees who comply with the statistical comparison.[44] These letters could note that the receipt of such letter would not be evidence of compliance with the EEO Rule at renewal time.

12. Although we agree that mid-term review letters should include some guidance as to areas of EEO deficiency, we find the information suggested by NAB is un-

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[25] *See* NAB Comments, at 1-3.
[26] *See* NAACP Comments, at 26; UCC Comments, at 23-24.
[27] *See* 47 U.S.C. §334(b).
[28] *See* UCC Comments, at 24; Reply Comments, at 10.
[29] *See Id.*
[30] *See* NAB Reply Comments, at 2.
[31] Conference Report, at H 8333-8334.
[32] The referenced criteria consist of a comparison of the composition of the stations' employment profile with the relevant labor force areas as follows. First, stations with five to 10 full-time employees would meet the guidelines if the proportion of minority and female representation in their overall staffs is at least 50% of that of the relevant labor force, and in the upper-level job categories at least 25% of that of the relevant labor force. Second, stations with 11 or more full-time employees would meet the guidelines if the proportion of minority and female representation is at least 50% of that of the relevant labor force, and in the upper-level job categories at least 50% of that of the relevant labor force.
[33] In this regard, we note that we customarily use the available labor force area in which the station is located. Accordingly, we will use alternative labor force data only when such data has been explicitly accepted by the Commission when it grants the last most recent license renewal. No initial requests for alternative labor force data will be accepted for use as part of the mid-term review analysis.
[34] *See* Conference Report, at H 8334.
[35] 47 C.F.R. §73.1020.
[36] *See Notice*, at 268.
[37] *See* NAB Comments, at 3.
[38] The fact that a station's renewal may be deferred pending resolution of related matters (*i.e.*, petitions to deny or informal objections), will have no effect on the timing of the mid-term review. The focus of the mid-term review will be on the station's workforce during the next license term while the renewal review will focus on EEO conduct during the previous license term.
[39] *See* 47 U.S.C. §334(b).
[40] *See* Conference Report, at H 8334.
[41] *See Notice*, at 268.
[42] *See Id.*
[43] *See* NAB Comments, at 4.
[44] *See Id.*

necessary. Broadcast television station licensees, like all broadcast licensees, are required to engage in continuous self-assessment of their EEO programs. As part of this self-assessment, broadcast television stations should be engaging in the type of analysis which will be conducted at mid-term.[45] Moreover, broadcast television station licensees should be aware of the requirements of our broadcast EEO Rule as well as the type of information requested on the Form 396. Accordingly, we find that the inclusion of the information which NAB suggests is unnecessary.[46] However, in light of the purpose of the mid-term review -- to serve as an early warning as to possible EEO program deficiencies -- our letters will provide each recipient with guidance as to areas of EEO deficiency.

13. We see no need to send "non-deficiency" letters to those licensees who comply with the processing criteria at mid-term. "Non-deficiency" letters are not required by the Act nor are they suggested in the legislative history. Moreover, as noted above, broadcast television station licensees, who engage in adequate self-assessment, are conducting the statistical comparison to be used for the mid-term review and, therefore, are already aware of how their employment profiles compare against the processing guidelines. In addition, as further discussed below, the mid-term review will serve only as an early warning to licensees. Accordingly, we will adopt the proposal to send mid-term review letters only to those licensees whose employment profiles fall below the processing guidelines.[47]

14. *Effect of Mid-term Review on Subsequent License Renewal.* In the *Notice*, the Commission noted that the 1992 Cable Act is silent as to the effect of mid-term reviews on subsequent renewals. Based on the legislative history, however, the Commission tentatively concluded that the mid-term review should serve only as an early warning that the licensee's overall EEO efforts may need improvement.[48] Accordingly, the EEO program of a licensee that does not receive a deficiency letter would not be treated as being in compliance with the EEO Rule at renewal time merely because the Commission did not issue a mid-term deficiency letter.[49]

15. In their comments, NAACP and UCC disagree with our conclusion. NAACP suggests that the mid-term review should be a factor when reviewing subsequently filed applications. It suggests that we "give teeth to midterm EEO reviews" by overruling our decision in *Petition to Prevent Continuing Violations of the Commission's Equal Employment Opportunity Rule*, 56 R.R.2d 445 (1984) (*"Equal Employment Opportunity Violations"*) and holding that a renewal will be called in early in cases where serious misconduct is found as a result of the mid-term review.[50] Similarly, UCC argues that a failure at mid-term coupled with a lack of improvement at renewal time should raise a "presumption of intent not to comply" and have a direct effect on the type of sanctions and amount of forfeiture issued.[51] NAB argues that the suggestions made by NAACP and UCC ignore Congress' intent, as reflected in the legislative history, that mid-term reviews would not be treated as a sanction.[52] 0416. We will adopt our conclusion that mid-term reviews should constitute only an early warning that a licensee's EEO efforts may need improvement. The Conference Report explicitly reveals Congress' intent that, "[t]his letter is not and is not to be treated for any purpose as a Commission sanction of a station's EEO practices."[53] NAACP's proposal, therefore, ignores explicit Congressional intent. Accordingly, we will adopt our proposal that the mid-term review will constitute only an early warning that a licensee's EEO efforts may need improvement. A station's compliance at mid-term will not be evidence of compliance at renewal. Further, the mid-term deficiency letter will not be treated as a sanction against the licensee. However, at renewal time, we will take cognizance of all pertinent license term EEO data, including data relied upon for the mid-term review.

B. Cable Industry Equal Employment Opportunity.

17. Congress' intent in amending the cable EEO provisions was to increase attention to the representation of minorities and women in top managerial positions within the cable industry.[54] Congress believed that an increase in female and minority representation in managerial positions advances the federal policy favoring program diversity.[55] Section 634, as amended, requires the Commission to collect more specific employment data from cable entities, including separate information on the job titles of employees listed within the various job categories.[56] In addition, the Act expands the current nine cable job categories to 15 and expands the scope of the cable EEO provisions to include multichannel video programming distributors.[57]

18. In the *Notice*, the Commission proposed a number of revisions to its rules and the Cable Annual Employment Report (FCC Form 395-A) in order to implement the cable EEO provisions of the 1992 Cable Act. Specifically, it proposed to collect employee data for full and part-time employees, separately and by job title.[58] In addition, it proposed to collect workforce, hiring, promotion and recruitment data for the six new job categories.[59] It sought

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[45] *See e.g.*, 47 C.F.R. §73.2080(c)(3).

[46] UCC argues that the letters could indicate exactly what steps the licensee should take to improve its recruitment practices. *See* UCC Reply Comments, at 10-11. This suggestion was made in the context of UCC's argument that we should conduct an overall EEO analysis at mid-term. In light of our decision regarding this issue, UCC's argument regarding the contents of the letter need not be discussed here.

[47] Licensees who do not receive a mid-term review letter may assume that their employment profiles comply with the processing criteria. *But see* para. 14, *infra*.

[48] *See Notice*, at 268.

[49] *See Id.*

[50] *See* NAACP Comments, at 26-27. We generally require "compelling reasons" and a substantial and material question of fact warranting designation for hearing before we will order a station to file its renewal application early. *See e.g., Applications of WWOR-TV, Inc., For Transfer of Control of WWOR-TV, Inc., Licensee os Station WWOR-TV, Channel 9, Secaucus, New Jersey*, 6 FCC Rcd 6569, 6574 (1991); *Greater Portland Broadcast Corp.*, 3 FCC Rcd 1953, 1954 (1988); *Sioux Empire Broadcasting Co.*, 9 FCC 2d 683, 684 (1967). Failure to meet the processing criteria at mid-term, by itself, would be insufficient evidence to warrant a call for the early filing of a renewal application. Therefore, NAACP's request is inappropriate.

[51] *See* UCC Comments, at 24-25.

[52] *See* NAB Reply Comments, at 2-3.

[53] *See* Conference Report, at H 8334.

[54] *See* Section 22(a) of the 1992 Cable Act.

[55] *See Id.*

[56] *See* 47 U.S.C. §554(d)(3)(A).

[57] *See* 47 U.S.C. §§554(d)(3)(A) and (h)(1).

[58] *See Notice*, 8 FCC Rcd at 268.

[59] *See Id.*, at 269.

comment on proposed definitions for the six new job categories and proposed to adopt the current definitions for the remaining nine job categories.[60] The Commission sought comment on whether it should provide specific labor force statistical data for each of the six new job categories and whether the 1992 Cable Act required it to conduct a competency-based analysis.[61] Finally, the Commission proposed to amend its rules to extend their scope to include multichannel video programming distributors.[62]

19. With respect to general comments in this rule making proceeding, Congresswoman Cardiss Collins expresses her concern that the Commission enforce the EEO provisions to the full extent authorized by Congress.[63] Many commenters from the cable industry express concern regarding the significant increase in preparation time and paperwork the new rules, as proposed in the *Notice*, would generate. In a joint pleading, various cable companies (the "Companies") state that, having made a commitment of corporate resources to recruitment, training and development of fair and innovative personnel practices, they object "to the diversion of corporate resources from these important activities to the production of burdensome and needless paperwork."[64] Other commenters suggest that, in developing the new rules, we eliminate "redundant" reporting requirements.[65] One commenter requests that, when fashioning new EEO reporting requirements, we bear in mind the disproportionate effect of any administrative increases on small cable operators.[66] Other comments express a belief that we should use existing procedures as much as possible in implementing the EEO provisions.[67]

20. Some commenters believe that the Commission's proposals did not go far enough. UCC argues that the Act requires "sweeping changes" to our EEO enforcement program. It states that, contrary to our interpretation of the legislative history, Congress found that our EEO efforts-based policy is ineffective and that instead, it intended a "rigorous" approach to EEO enforcement.[68] Noting the few number of minorities promoted and hired in top jobs in the cable industry, UCC, as well as NAACP, proposes a number of significant changes to every aspect of our cable EEO enforcement program.[69] Time Warner Cable ("Time Warner") replies that Congress did not intend a drastic overhaul of our EEO enforcement policy and notes that the only significant changes made by the 1992 Cable Act were the addition of six new job categories and the raising of the basic forfeiture amount. It argues that Congress "perceived" an underrepresentation of women and minorities in policy-making positions and imposed additional reporting requirements to improve the Commission's ability to evaluate them.[70] 21. Nothing in the Cable Act indicates that Congress required the "sweeping" changes that UCC and NAACP suggest. The Act's language requires us to adopt revisions to our rules "to implement the amendments made to this section by the Act."[71] The Act amends Section 634 to: 1) require collection of employee data by job title; 2) add six new upper-level job categories; 3) raise the basic forfeiture amount to $500; and 4) extend the scope of the cable EEO provisions to "any multichannel video programming distributor." The rules adopted herein fully implement the provisions of the 1992 Cable Act. No other changes to our cable EEO rules are required.[72]

1. Collection of Employee Data.

22. The Act mandates a number of additional reporting requirements for cable operators. In the *Notice*, the Commission proposed several revisions to its Form 395-A. Many commenters note that the revised form, as proposed in the *Notice*, would generate a significant increase in time and volume of paperwork.[73] In view of the comments, we have revised the proposed Form 395-A.[74] Specifically, we will continue to collect full and part-time employee data in the aggregate on one grid. To collect the required job title information, we will allow cable entities to submit computer-generated employee lists as suggested by one commenter. We will also require cable operators to maintain recruitment information for all 15 job categories. However, we will not collect this information annually as proposed in the *Notice*. Rather, cable operators will be expected to submit this information upon Commission request. We believe our revisions comply with the require-

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[60] *See Id.*

[61] *See Id.*

[62] *See Id.*

[63] *See* Letter from Congresswoman Cardiss Collins, dated April 15, 1993, to Chairman James H. Quello.

[64] Companies Comments, at 2.

[65] *See e.g.*, Companies Comments, at 6-7; Consortium of Small Cable Television Companies (the "Consortium") Comments, at 3-4; Tele-Communications, Inc. ("TCI") Reply Comments, at 1-2.

[66] *See* Consortium Comments, at 2. Alternatively, the Consortium suggests that we streamline the reporting procedures for small cable systems which could be defined as "an independently-owned system which has either: (a) no more than 10,000 subscribers; or (b) annual gross revenues of $7.5 million or less." Consortium Comments, at 4. We are revising our reporting form to require less data than that proposed in the *Notice*. Moreover, our rules already take cognizance of small cable systems. Those employment units with fewer than six full-time employees are subject to a "one-time only" filing requirement. In light of this, we see no reason to further "streamline" the reporting requirements for small cable operators as the Consortium suggests.

[67] *See* Time Warner Comments, at 14; Reply Comments, at 13.

[68] *See* UCC Comments, at 2-5.

[69] *See Id*, at 2-13; *see generally*, NAACP Comments. For example, UCC suggests that we collect more detailed documentation as part of our annual and five year review of cable operators' EEO programs. NAACP suggests revisions to the CARS renewal process apparently to facilitate the filing of petitions to deny by citizens groups. As explained below, these changes are not required by the 1992 Cable Act.

[70] *See* Time Warner Reply Comments, at 5-6.

[71] 47 U.S.C. §554(d)(1).

[72] NYSC states that the *Notice* was unclear as to how the "proposed" on-site reviews will be conducted and EEO compliance recommendations implemented. We did not propose to conduct on-site reviews as NYSC suggests. On-site reviews were implemented pursuant to the 1984 Cable Act. Our current procedures for conducting on-site reviews and determining EEO compliance will not change. For a further discussion regarding our cable EEO rules and enforcement procedures, *see Report and Order*, in MM Docket No. 85-61, 102 FCC 2d 562 (1985).

[73] For example, the Companies note that our proposal would increase the number of pages for each 395-A report from the current four pages to over 20 pages. *See* Companies Comments, at 4. TCI states that our proposal would generate at least 4,000 additional pages of employment data for its 400 employment units. *See* TCI Comments, at 2.

[74] *See* Appendix D.

ments of the Act and will provide adequate information for our cable EEO review, with a minimum burden on all parties involved.

23. *Collection of Full and Part-time Employee Data.* The Act requires collection of employee statistical data for full and part-time employees.[75] In the *Notice*, the Commission proposed to collect employee data for full and part-time employees on two separate grids.[76] Upon review of the comments regarding the significant increase in paperwork the proposed Form 395-A would generate, we will continue to collect workforce data on full and part-time employees in the aggregate on one grid. However, the full and part-time status of each employee will be recorded on a list of employees reported by job title. Thus, the grid portion of the form will remain the same, as will our application of the processing criteria.

24. *Job Title Information.* The amended Section 634(d)(3)(A) requires the collection of job title information.[77] In the *Notice*, the Commission proposed to collect this data in a separate section which required cable entities to list job titles of employees within each of the 15 job categories.[78] TCI suggests that we allow cable operators to present their job title data as compiled on internal record-keeping systems (*i.e.*, computer generated payroll lists).[79] UCC suggests that we revise the instructions for this section to clarify that job title information must be provided for each of the 15 job categories.[80]

25. In recognition of the significant increase in reporting which our proposed form would require, we agree with TCI and will accept computer-generated employee lists that show the job title, job category, full or part-time status of the position, the gender, and the race or national origin of the person holding the position. Job titles may be listed in any order within each job category to the extent possible.[81] Cable operators choosing not to use this format are expected to provide complete data in an organized, decipherable fashion.

26. *Collection of Recruitment Information.* Section 634(d)(3)(B), as amended by the Act, requires the collection of information on "hiring, promotion and recruitment practices necessary for the Commission to evaluate the efforts of entities to comply with the provisions of paragraph (2) of this subsection."[82] The legislative history states that "[t]he report is required to include information on hiring, promotion, and recruitment practices that the FCC will need to evaluate the compliance of entities with this section."[83] Thus, the language in the Act and the legislative history suggest that Congress allowed the Commission some discretion in determining what hiring, promotion and recruitment information is necessary to evaluate EEO performance.

27. In the *Notice*, the Commission proposed to collect specific recruitment information for the six new job categories in the form of a narrative.[84] However, some commenters argue that the narrative is unnecessary in that the hiring results, as well as the responses to questions in Section III of the Form 395-A (*See* Appendix D), provide sufficient information to determine EEO compliance.[85] Comcast Corporation, Jones Intercable, Inc., and Newhouse Broadcasting Corporation ("Joint Parties") suggest that we collect this information randomly.[86] CRB and TCI suggest that we collect the data on a grid instead of a narrative.[87]

28. Upon review of the comments, we have determined that cable systems should be required to provide recruitment information for all job categories, including the six new job categories, upon Commission request. The annual submission of workforce, hiring and promotion data, particularly for the six new job categories, as well as responses to the questions in Section III of the Form 395-A,[88] will provide sufficient information for the Commission staff to determine EEO compliance. However, as is our current practice, if our review raises any questions or suggests EEO non-compliance with regard to any aspect of the EEO program, including the six new job categories, additional inquiries and/or an on-site review will be conducted.[89] In this regard, we remind cable operators that

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[75] *See* 47 U.S.C. §554(d)(3)(A).

[76] *See Notice*, at 268. Cole, Raywid and Braverman ("CRB"), on behalf of its clients, and TCI urge us to continue to apply our processing guidelines to the employment unit as a whole. *See* CRB Comments, at 5-7; TCI Comments, at 8-10. CRB also suggests that we modify our current definition of "full-time employee" to allow cable operators more flexibility in classifying, as full-time, those employees who do not work fixed schedules of 30 hours or more, but who are otherwise considered by employers as full-time employees. *See* CRB Comments, at 5. In light of our decision to continue to collect data on full and part-time employees in the aggregate, we will continue to apply the processing guidelines to the employment unit as a whole. However, we see no reason to modify our current definition of "full-time employee" as CRB suggests. This definition also is used for determining the status of employees within the broadcast industry. *See* Instructions For Completion of FCC Form 395-B Broadcast Station Annual Employment Report, Section 8. For purposes of uniformity, we believe it is appropriate to use the same definition for both industries.

[77] *See* 47 U.S.C. §554(d)(3)(A).

[78] *See Notice*, at 268, 297.

[79] *See* TCI Comments, at 11.

[80] *See* UCC Comments, at 16.

[81] We also will eliminate the request for a breakdown of employees in certain positions by gender and race or national origin on Part I of the SIS form as requested by several commenters. *See e.g.*, Companies Comments, at 6-7; Consortium Comments, at 3-4; TCI Reply Comments, at 1-2. This information is essentially the same as that information now requested annually. However, we will continue to require the submission of job descriptions in response to the SIS form.

[82] 47 U.S.C. §554(d)(3)(B). Paragraph (2) of Section 634(d) specifies the various EEO program requirements with which cable operators must comply. *See* 47 U.S.C. §554(d)(2).

[83] House Report, at 113.

[84] *See Notice*, 8 FCC Rcd at 269, 295-296. UCC supports this proposal. *See* UCC Reply Comments, at 12-13.

[85] *See* Companies Comments, at 7; Time Warner Comments, at 7-9.

[86] *See* Joint Parties Reply Comments, at 4-5.

[87] *See* CRB Comments, at 7-8; TCI Comments, at 11-12. CRB also suggests a revision in the instructions to account for operators who refuse to provide the requested data. *See* CRB Comments, at 8.

[88] *See* Appendix D.

[89] In its comments, UCC argues that the Form 395-A is unreliable in determining EEO compliance. *See* UCC Comments, at 7-10. Our review does not end with the cable operator's responses to the nine questions. Indeed, our initial cable EEO review includes a review of the workforce, hiring and promotion data submitted on the Form 395-A. Our experience

they are expected to maintain sufficient documentation of their efforts to recruit qualified females and minorities for all vacancies, including those positions fallingPwithin the six new job categories. Failure to provide sufficient documentation regarding such recruitment efforts as well as other aspects of an EEO program could result in denial of certification and other sanctions.

2. Definitions for Job Categories.

29. The amended Section 634(d)(3)(B) requires the Commission to define the six new job categories "so as to ensure that only employees who are principal decisionmakers and who have supervisory authority are reported for such categories."[90] The legislative history provides no further guidance in defining the six new job categories. Section 634(d)(3)(B) also requires the Commission to adopt rules that define the remaining nine job categories "in a manner that is consistent with the Commission policies in effect on June 1, 1990."[91] However, with respect to the nine other categories, the legislative history indicates that we should follow Congress' directive in 1984 "|to ensure| that the definitions accurately reflect the nature of the categories and the specific positions within them."[92] The legislative history further indicates that Congress allowed the Commission some authority to reexamine all of its existing job categories.[93]

30. In the *Notice*, the Commission proposed definitions for the six new job categories and proposed to adopt its current definitions for the remaining nine job categories.[94] Some commenters generally support our proposed definitions.[95] However, several commenters raise significant concerns regarding the proposed definitions for three of the six new job categories. In addition, some commenters suggest revisions for seven of the nine original job categories.

31. Upon review of the comments in this proceeding, we have revised or attempted to clarify definitions for 11 of the 15 job categories.[96] We will adopt the definitions for "Comptroller," "Professionals,"[97] "Laborers," and "Service Workers" as proposed in the *Notice*. In addition, we will revise the definition for the "General Manager" category to include the title "Systems Manager" as a position possibly falling within this category. We also will revise the "Production Manager," "Managers," "Technicians," "Sales,"[98] "Office and Clerical," "Craftsworkers" and "Operatives" categories as some comments suggest. For example, we will adopt CRB's suggestion that we specify that an incumbent within the "Production Manager" category should be a senior employee responsible for advertising and/or production of local community programming.[99] In addition, we will adopt its request that we add language, in the "Managers" category, which acknowledges that managers may be found in "segments" of a company's operations or within "subdepartments" of a major department.[100] We also will adopt NYSC's suggestion that our definition for this category focus on the hiring and firing authority generally held by managers.[101] Moreover, we will adopt Time Warner's suggestion that we clarify that employees falling within the six new job categories fall within the "Managers" category.[102] However, we will not adopt TCI's suggestion that we remove the title "program directors" from the "Managers" categoryand place it only in the "Professionals" category.[103] Some companies may appropriately classify "program directors" within the "Managers" category.

32. We also will adopt CRB's suggestions that we include additional titles within the "Technicians" category and language in the "Sales" category which refers to employees who engage in direct customer contact for purposes of product and service promotion. In addition, we will adopt CRB's request that we list "splicers" in the "Craftsworkers" category instead of the "Operatives" category.[104] Finally, we will adopt the suggestion from CRB and TCI that we list "customer service representatives" in the "Office and Clerical" category.[105] However, we will, as the Joint Parties request,[106] clarify that proper classification depends on the level of the employee's responsibilities regardless of the specific title. We will revise our rules to include these changes.[107]

33. Many commenters raise concerns regarding our proposed definitions for the "Corporate Officers", "Chief Technician," and "General Sales Manager" categories. In the *Notice*, we proposed to define "corporate officers" as an "|e|mployee with official authorization to represent the

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has been that our review of the entire Form 395-A is sufficiently reliable in determining which cable systems have questionable EEO programs.

[90] 47 U.S.C. §554(d)(3)(B).

[91] *Id.*

[92] House Report, at 113 (citing *Report and Order*, in MM Docket No. 85-61, 102 FCC 2d 1575 (1985) (citing the 1984 House Report, at 91.)

[93] *See Id.*

[94] *See Notice*, 8 FCC Rcd at 269, 301-305.

[95] *See e.g.*, Continental Cablevision ("Continental") Comments, at 2; Time Warner Comments, at 3; UCC Comments, at 14; CTHRA Reply Comments, at 2; Joint Parties Reply Comments, at 2.

[96] *See* Appendix B.

[97] The New York State Commission on Cable Television ("NYSC") argues that our current definition for "professionals" is too broad and that we should distinguish between "licensed" and "unlicensed" professionals. *See* NYSC Comments, at 2. We see no reason to revise our current definition as NYSC suggests. Neither the Cable Act of 1984 nor the 1992 Cable Act makes such a distinction.

[98] Although not suggested in the comments, we will revise the definition for this category to clarify that it includes employees who ordinarily are paid by commission. We believe this clarification will ensure more accurate reporting of employees who appropriately fall within this category.

[99] *See* CRB Comments, at 4.

[100] *See Id.*

[101] *See* NYSC Comments, at 2.

[102] *See* Time Warner Comments, at 2.

[103] *See* TCI Comments, at 8.

[104] *See* CRB Comments, at 4.

[105] *See* CRB Comments, at 5; TCI Comments, at 8.

[106] *See* Joint Parties Reply Comments, at 4.

[107] UCC suggests that we include detailed examples of job descriptions that are appropriate and inappropriate for each job category. It states that cable operators should be told that an "office manager" with clerical responsibilities or a "Building Supervisor" with janitorial duties should not be classified as a "Manager." *See* UCC Comments, at 15-16. We do not believe that "examples" of job descriptions are necessary. The instructions to the Form 395-A inform cable operators that, in classifying employees, they should rely on the responsibilities of the position and not the job title. Our rules will include this language also.

company in a fiduciary capacity."[108] Most of the commenters object to the proposed definition and use of the term "fiduciary" as overly broad and imprecise.[109] In addition, several commenters express concern about the counting of employees who fall into this and other categories (*i.e.*, Vice President and General Manager).[110] Many of the commenters submit alternative definitions. For example, the Companies and UCC suggest definitions whereby only positions specified by the company's governing regulations (*i.e.*, Articles of Incorporation, Articles of Partnership, By-Laws) would be included within this category.[111] Time Warner suggests that the definition should be based on the definition of "officer" under federal securities law.[112] Both the National Cable Television Association ("NCTA") and Continental suggest that the definition should be a senior executive as defined by the company. Their proposals contain a list of examples of titles falling within the category. In addition, the proposals include language clarifying that corporate officers are generally located at corporate headquarters and that the title "Vice President and General Manager" would normally be classified only as a "General Manager."[113] CRB and TCI suggest that we include language clarifying that this category is reserved only for titles which have not been otherwise classified.[114]

34. We will revise our definition to substantially conform to those proposed by the Companies and UCC. The "corporate officers" category will include only those employees who are responsible for setting policies for the overall operation of the company[115] and who hold corporate offices as designated by the company's governing regulations. We believe this revised definition most appropriately conforms with the requirements of the Act. In addition, the revised definition establishes an objective standard by which we can determine whether employees are appropriately listed within this category.

35. Some commenters note that the title "Chief Technician" is outdated in the cable industry and has been replaced with titles such as "Chief Engineer," "Technical Operations Manager," "Technical Manager," or "Plant Manager."[116] In addition, the commenters indicate that employees within this category also may be responsible for fleet supervision and maintenance, inventory control, tower leasing, profit and loss goals and budgeting and approving capital expenditures.[117] They also state that a person in this category could oversee technical personnel in the installation, service, maintenance, and construction departments.[118] However, CRB notes that a "Chief Technician" may not necessarily be responsible for all technical personnel at a system.[119] We will revise our definition to conform with the duties described by these comments in order to reflect the current cable workforce.[120]

36. The comments indicate that the definition for the "General Sales Manager" category, as proposed in the *Notice*,[121] is overly broad. Continental states that Telemarketing Managers, Sales Supervisors and Sales Managers would inappropriately fall within our proposed definition. As an alternative, it proposes a definition which would explicitly exclude advertising sales and telemarketing.[122] CRB proposes a definition, also supported by CTHRA, which would include senior-level individuals responsible for the marketing function of the system.[123] We will revise our definition as proposed by CRB. We believe that CRB's proposed definition most accurately reflects the general function of the "General Sales Manager" position within the cable industry.

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[108] *Notice*, at 304.

[109] *See e.g.*, Companies Comments, at 5-6; CRB Comments, at 2; Continental Comments, at 3; NCTA Comments, at 5; NCTA Reply Comments, at 2-3; NYSC Comments, at 2; TCI Comments, at 7; Time Warner Comments, at 3-4; Time Warner Reply Comments, at 2-3; UCC Comments, at 14-15; CTHRA Reply Comments, at 2-3; Joint Parties Reply Comments, at 2-3.

[110] *See e.g.*, Companies Comments, at 5-6; TCI Comments, at 7; CTHRA Reply Comments, at 4.

[111] *See* Companies Comments, at 5-6; UCC Comments, at 14-15. The Companies would define this category as, "any employee who is an Official and Manager and who also holds a corporate office (e.g., President, Vice President) as designated in the Articles of Incorporation, Articles of Partnership or By-Laws of the company by which he or she is employed." *See* Companies Comments, at 6. UCC would define this category as including, "[a] person selected, in accordance with the company's governing regulations (e.g. Bylaws), to act primarily for the company's benefit in a defined capacity." UCC Comments, at 15.

[112] *See* Time Warner Comments, at 3-4; Reply Comments, at 2-3. Thus, Time Warner would define this category as "a president, vice president, secretary, treasurer, or principal financial officer, comptroller or principal accounting officer, and any person routinely performing corresponding functions with respect to any organization whether incorporated or unincorporated." Time Warner Comments, at 4.

[113] *See* NCTA Comments, at 6; Continental Comments, at 3. NCTA's proposal is supported by the Cable Television Human Resources Association ("CTHRA") and the Joint Parties because it defines the incumbent as a "senior" executive and eliminates the term "fiduciary." *See* CTHRA Reply Comments, at 3; Joint Parties Reply Comments, at 2-3.

[114] *See* CRB Comments, at 2; TCI Comments, at 7, Appendix A. We will adopt this suggestion in response to concerns regarding the counting of employees who fall within the "corporate officers" and another of the six new job categories (e.g. Vice President and Comptroller).

[115] *See* Definition of "Managers" in Appendix B.

[116] *See e.g.*, CRB Comments, at 2-3; TCI Comments, at 8; CTHRA Reply Comments, at 3; Joint Parties Reply Comments, at 3.

[117] *See e.g.*, CRB Comments, at 2-3; TCI Comments, at 8; Joint Parties Reply Comments, at 3..

[118] *See Id.*

[119] *See* CRB Comments, at 3.

[120] *See* Appendix B. Continental would define this category as, "an employee who has overall technical responsibility at an operational unit or system level for the transmission of a clear and consistent quality picture to cable television subscribers." Continental Comments, at 4. We believe our revised definition is more appropriate since it takes cognizance of the additional duties of an employee within this category.

[121] *See Notice*, 8 FCC Rcd at 302.

[122] *See* Continental Comments, at 4.

[123] *See* CRB Comments, at 3. CRB and CTHRA note that our proposal would invite overlap with positions such as "Vice President of Marketing" and "Vice President and General Sales Manager." CRB states that we should clarify that these dual positions should be reported in only one category. *See* CRB Comments, at 3; CTHRA Reply Comments, at 3-4. We have addressed this concern in our revised rules. *See* Appendix B.

3. Analysis of Employee Data.

37. The amended Section 634(d)(3)(B) states that the Commission shall prescribe the method by which cable entities compute and report the number of minorities and women in the job categories "in proportion to the total number of qualified minorities and women in the relevant labor market."[124] As noted in the *Notice*, the Commission believed that this language could be read as requiring it to provide labor force statistics for each of the new job categories as it currently does for the original nine job categories. The legislative history, however, suggests that we should include the six new job categories within our evaluation of the upper-level positions following our current process.[125] Accordingly, the Commission tentatively concluded that the Act did not require it to provide statistical data for the six new job categories.[126] The Companies support our conclusion that statistical data for the six new job categories is unnecessary.[127] Time Warner, however, argues that we should provide statistical data for each of the new categories, to the maximum extent possible, for purposes of more meaningful self-assessment.[128] It states that this data could be provided based on equivalent job classifications for which the Census Bureau maintains information.[129]

38. Based upon the record in this proceeding, we will adopt our proposal to continue to provide statistical data only for each of the original nine job categories and in the aggregate. The labor force data available to the Commission includes only the nine original job categories. Moreover, in analyzing the EEO compliance of cable systems, we will include the unit's workforce statistics for the six new job categories in our review of the unit's upper-level positions. Specifically, for purposes of our analysis of a system's overall and upper-level employment profiles, the six new categories will be treated as titles within the "Managers" category. The "Managers" category is one of the four "upper-level" categories. In addition, use of a more finite comparison of a few individuals within a category with the availability of persons with similar jobs in the labor force, might cause the Commission to undertake a competency-based analysis, which was not Congress' intent.

39. The reference to "qualified minorities and females" in the Act and the legislative history also raises the issue as to whether the Commission is required to engage in a competency-based analysis. The legislative history also states, however, that "[t]he method for comparing the composition of the cable operator's workforce with that of the relevant labor market has not been changed...."[130] The few parties that commented on the competency-based analysis issue agree with our conclusion that Congress did not intend that the Commission engage in a competency-based analysis.[131] Accordingly, based upon the record in this proceeding, we will not engage in a competency-based analysis when analyzing cable systems' employment profiles.

4. Multichannel Video Programming Distributors.

40. The amended Section 634(h)(1) expands the scope of the EEO provisions to include "any multichannel video programming distributor" (MVPD).[132] The amended Section 602(12) defines an MVPD as "a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming."[133] The amendment reflects Congress' belief that "it is important to ensure women and minorities equal employment and promotion opportunities in new, emerging, and alternative technologies."[134] In the *Notice*, the Commission proposed to amend its rules to include MVPDs and to adopt the Act's definition for this term.[135] In addition, it proposed rules specifically imposing the cable EEO requirements on licensees and permittees of MMDS and DBS facilities. The *Notice*[136] raised the video dialtone issue in terms of how the rules should apply in situations where separate entities provide program delivery and program sales functions by cross reference to a parallel consideration of this issue in our broadcast signal carriage proceeding.[137]

41. In response to the *Notice*, the Wireless Cable Association ("WCA") requests that, in adopting our final rules, we note that most licensees of MMDS facilities also operate MDS facilities.[138] It suggests that we conform the MDS/MMDS EEO reporting requirements[139] to the requirements of the 1992 Cable Act so that such licensees will be required to file only one report. Alternatively, WCA suggests that we revise our rules to state that those licensees of MDS facilities[140] who are not involved in the direct selling of multiple channels of video programming to the public should file an EEO report only pursuant to Section 21.307 of our rules.

42. Bell Atlantic Telephone Companies ("Bell Atlantic") and GTE Service Corporation ("GTE") request that we clarify that video dialtone carriers are not multichannel video programming distributors and, therefore, are not subject to our cable EEO requirements.[141] Both telephone companies argue that local exchange carriers (LEC) offering video dialtone service will provide only a common carrier platform to video programmers and, as such, will

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124 47 U.S.C. §554(d)(3)(B).

125 *See* House Report, at 112.

126 *See Notice*, at 269.

127 *See* Companies Comments, at 5.

128 *See* Time Warner Comments, at 10.

129 *See Id*, at 10-11.

130 House Report, at 112.

131 *See* Continental Comments, at 5; Time Warner Comments, at 4-5; CTHRA Reply Comments, at 4.

132 *See* 47 U.S.C. §554(h)(1).

133 47 U.S.C. §522(12).

134 House Report, at 113.

135 *See Notice*, 8 FCC Rcd at 269. The Commission also referred to the more detailed discussion of this term in *Notice of Proposed Rule Making*, in MM Docket No. 92-259, 7 FCC Rcd 8055 (1992). (*"Broadcast Signal Carriage NPRM")* .

136 *See Notice*, 8 FCC Rcd at 270, ¶42.

137 *See Notice of Proposed Rule Making*, MM Docket No. 92-259, 7 FCC Rcd 8055 (1992). (*"Broadcast Signal Carriage NPRM")*.

138 *See* WCA Comments, at 1-2.

139 *See* 47 C.F.R. §21.307.

140 "MDS" is used herein to refer collectively to the single channel (MDS) and multichannel (MMDS) authorizations. *See Report and Order* in PR Docket 92-80, 8 FCC Rcd 1444, n.1 (1993).

141 *See* Bell Atlantic Comments, at 1-2; GTE Comments, at 1-3.

not be involved in the selling of video programming directly to the public. These companies argue that we should follow our decision in the *Broadcast Signal Carriage NPRM* in which we stated that a video dialtone carrier, which does not sell programming or interact directly with the public, would not be subject to our retransmission consent provisions.[142]

43. Congresswoman Cardiss Collins, NCTA and UCC argue that video dialtone should be subject to the cable EEO provisions. Congresswoman Collins states that she intended that the EEO provisions should be imposed on any multichannel video programming distributor, including a video dialtone carrier. She reminds the Commission that Congress intended that the EEO provisions should be imposed on any new, emerging and alternative technology.[143] NCTA argues that video dialtone providers engage in video distribution; that they allow customer-programmers to distribute their services to subscribers; and that video dialtone service and their customer-programmers fall within the openly worded statutory definition. Moreover, NCTA argues that, by extending the reach of the EEO provisions to all multichannel video programming distributors, Congress decided to apply the EEO provisions to all multichannel distributors equally. Recognizing that the Act does not explicitly identify telephone companies offering video dialtone service, NCTA asserts that Congress did direct the Commission to ensure women and minorities equal employment and promotion opportunities in new, emerging and alternative technologies. Finally, NCTA argues that there is no justification for omitting these services. [144]

44. UCC argues that we are compelled to exercise EEO jurisdiction over video dialtone providers for three reasons. First, UCC asserts that our common carrier EEO requirements are inadequate. Second, UCC claims that video dialtone carriers share a monopoly status and leased access characteristic with cable operators and other common carriers. Specifically, LECs offering video dialtone service will provide a common carrier platform that will parallel their monopoly local exchange infrastructure. It contends that this monopoly status over the transport service will inhibit the program choices of program8 suppliers which deliver programming to the public. UCC argues that it is this exclusive transport function which necessitates EEO oversight. Finally, UCC argues that LECs offering video dialtone have been given substantial programming privileges by our *Video Dialtone* decision.[145] UCC argues that our *Video Dialtone* decision specifically allows LECs offering video dialtone to provide programming such as interactive shopping, video multimedia graphics, news and stock market videotext, video games, computer software, and online airline guides. UCC argues that these programming privileges, along with the rules permitting expanded relationships with video programmers (*e.g.*, beyond the carrier-user exemption and permissible non-cognizable ownership relationships), will afford LECs offering video dialtone a significant amount of influence over programming.

45. Congress' ultimate goal in enacting the EEO provisions of both the 1984 and 1992 Cable Acts was to advance the Nation's policy favoring program diversity.[146] As Congress states in the legislative history to the 1992 Cable Act, "... increased equal employment opportunities (EEO) for women and minorities, particularly in decision-making and managerial positions.... is a crucial means of assuring that program service will be responsive to a public consisting of a diverse array of population groups."[147] By imposing the EEO provisions on cable operators, Congress apparently determined that these entities, which exercise selection control over video programming provided directly to the consumer, have the greatest and most direct effect on the programming choices offered to the American public. Similarly, it is reasonable to conclude that, by expanding the scope of these provisions to include any multichannel video programming distributor, Congress intended to impose the EEO provisions only on "new, emerging and alternative technologies" that also exercise control over the programming which these technologies offer directly to the public. Accordingly, we will amend our rules to require compliance with our cable EEO provisions by those entities which have control over more than one channel of video programming provided directly to the public. An entity is deemed to have control over the video programming it distributes if it selects video programming channels or programs and determines how they are presented for sale to consumers. We believe that it is the employment practices of these entities which will have the greatest and most direct effect on the diversity of program choices offered to the American public. We clarify below the entities that are subject to these rules.

46. A LEC offering video dialtone service currently does not provide video programming directly to the public or have the ability to exercise control over the selection of video programming provided directly to the consumer.[148] Consequently, LECs are not under these circumstances

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[142] *See e.g.*, Bell Atlantic Comments, at 2; GTE Comments, at 2. *See also Report and Order*, MM Docket No. 92-259, 8 FCC Rcd 2965, 2998 (1993). We did hold, however, that the customer-programmers of a video dialtone provider would be subject to the retransmission consent provisions.

[143] *See* Letter from Congresswoman Cardiss Collins dated April 15, 1993, to Chairman James H. Quello.

[144] *See* NCTA Comments, 7-9. In its reply, NCTA argues that telephone companies that provide video dialtone service are cable operators because they are responsible, through any arrangement, for the management and operation of cable service. NCTA Reply Comments, at 4-5. We have previously held that telephone companies who offer video dialtone are not cable operators and that video dialtone service is not a cable service. *See Telephone Company-Cable Television Cross-Ownership Rules, Section 63.54 - 63.58*, 7 FCC Rcd 300 (1992); *aff'd on reconsideration, see also*, 7 FCC Rcd 5069 (1992). Moreover, in adopting the *Video Dialtone Decision, Second Report and Order*, in CC Docket No. 87-566, 7 FCC Rcd 5781, 5789 (1992), we held that video dialtone carriers would not be permitted to select, or maintain a cognizable financial interest in, video programming, which would be tantamount to acting as a traditional cable operator.

[145] In its Reply, UCC argues that it is these privileges that make LECs offering video dialtone service multichannel video programming distributors, even under the analysis adopted in the *Broadcast Signal Carriage* rulemaking proceeding. *See Broadcast Signal Carriage: R&O*, at 2998.

[146] *See* Section 22(a) of the Cable Act of 1992; House Committee on Energy and Commerce H.R. Rep. No. 934, 98th Cong., 2d Sess. (1984) at 85. (Hereinafter "1984 House Report").

[147] House Report, at 111. *See also* 1984 House Report, at 85.

[148] The Commission has specifically ruled that the expanded affiliation privileges granted to LECs offering video dialtone do not allow telephone companies to exercise influence or control over video programming. *See Video Dialtone Decision*, at 5789,

subject to our cable EEO provisions. Rather, the entity that exercises control over video programming -- the program service provider using the video dialtone transport facility -- will under our new rules be subject to our EEO rules and policies. Similarly, a licensee or lessee of an MDS facility which does not exercise control over the video programming distributed (*e.g.*, those operating as common carriers) would not be subject to these cable EEO rules. Rather, our EEO requirements would apply to the "wireless cable" provider, whether using owned or leased MDS (and/or ITFS) facilities to distribute video programming.[149] Likewise, the licensee of a DBS facility that does not exercise control over the video programming it distributes would not be subject to our EEO rules. Rather, our EEO requirements would apply to the"provider" of the DBS service[150] whether using owned or leased satellite facilities to distribute video programming.[151] If both the licensee and the customer-programmer exercise control, both would be subject to the EEO rules.

47. In each of the above-listed scenarios, the cable EEO provisions apply to those program packagers who distribute two or more channels of video programming directly to the public. We do not believe, however, that Congress intended to impose the cable EEO requirements on entities that principally own and originate programming, even though a small portion of their business may be devoted to distributing commonly-owned programming in packages to subscribers. We will, therefore, adopt a limited exception to the cable EEO rules to accommodate such programmers. Specifically, a programming service offering six or fewer channels of commonly-owned video programming over a leased transport facility will not be subject to the cable EEO requirements. However, a programmer offering more than six channels of commonly-owned video programming must comply with the cable EEO requirements.[152]

5. Effective Date of New Provisions.

48. TCI notes that the reporting year for many cable systems may be as much as six months underway when our final rules are adopted. It, therefore, requests that we permit operators to implement the new reporting requirements beginning with the 1995 reporting year.[153]

49. TCI's argument lacks merit. The information required by the Act and our amended rules is not so significantly different from previous reporting requirements as to justify unnecessary delays in implementation. The 1992 Cable Act merely requires cable operators to provide more specific data than previously required.[154] Accordingly, TCI's suggestion is rejected.[155]

C. New Matters Raised By the Comments.

50. NAACP and UCC propose significant changes to every aspect of our EEO enforcement program for the broadcast and cable television industries. Both commenters request that the Commission issue a further notice of proposed rule-making to consider their suggestions.[156] In addition, several commenters from the cable industry request

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5817, 5818 n.180, 5819. Indeed, LECs are explicitly prohibited from providing video programming directly to subscribers under the Communications Act. *See* 47 U.S.C. §533(b).

[149] Typically, "wireless cable" providers use some combination of 13 MDS channels available to them on a full-time basis and 20 channels from the Instructional Television Fixed Service available to them on a leased, part-time basis, to transmit video entertainment programming to subscribers. *See e.g., Report and Order* in PR Docket No. 92-80, at 1444, n.8 . Accordingly, although not raised in the comments to the *Notice*, we believe that it is appropriate to include qualifying users of ITFS facilities within the scope of the definition for "multichannel video programming distributor."

[150] The definition of a "provider" of DBS service may be clarified or more closely defined in the future as it is implicated in other regulatory contexts. *See e.g., Notice of Proposed Rule Making*, in MM Docket No. 93-25 (released March 2, 1993) (*Direct Broadcast Satellite Public Service Obligations).*

[151] As with cable entities, the EEO provisions will apply to program service providers/entities as employment units. *See* 47 C.F.R §76.71(b). A headquarters office will be treated as a separate employment unit to the extent the work of that office is primarily related to the operation of more than one employment unit. *See* 47 C.F.R. §76.71(c). Each entity should file an Annual Employment Report (Form 395-A) for each employment unit with six or more full-time employees. As is the current practice with cable entities, we will not require an annual submission from program service provider/entities with less than six full-time employees. However, we will require such entities to initially identify that they have less than six full-time employees and are not subject to the statistical reporting requirements. Program service provider/entities will be subject to the EEO annual certification review, five year review, and on-site reviews currently imposed on cable entities.

[152] For purposes of this exception, programming services will be considered "commonly-owned" if the same entity holds a majority of the stock (or is a general partner) of each program service.

[153] *See* TCI Comments, at 1-4. For example, the 1994 reporting year, for some companies, began in January 1993 and will end in January 1994.

[154] The six new job categories are actually titles falling within the previously-designated "Officials and Managers" category. To report the number of officials and managers, a cable operator had to know the number of corporate officers, general managers, chief technicians, comptrollers, general sales managers, and production managers it employed. Moreover, we note that, in its comments, TCI suggested that we allow cable operators to present job title data as already compiled for internal record-keeping purposes such as for payroll.

[155] Entities using MDS, ITFS, DBS, TVRO, and/or video dialtone transport facilities that previously have not been subject to the cable EEO requirements are expected, as of the effective date of these rules, to ascertain the requirements of the cable EEO regulations and to take steps to ensure compliance with all of these provisions, including the reporting requirements. Although the Commission will make an effort to compile a mailing list of the entities newly subject to the cable EEO regulations, it is ultimately the responsibility of each "multichannel video programming distributor" to which the statutory requirement applies to obtain and file the requisite annual reporting forms. Parties seeking to be included on the forms mailing list are requested to provide the Commission (Equal Employment Opportunity Branch, Mass Media Bureau) with a letter indicating the company's name and address and the location(s) of the regulated operation no later than October 1, 1993. We anticipate that entities that are newly subject to the cable EEO rules will file cable annual employment reports (FCC Form 395-A) pursuant to 47 C.F.R. §76.77 beginning with the 1994 Annual Employment Report. However, in order to facilitate the transitional filing period for these entities we will waive the requirement for the submission by these entities of 12-month hiring and promotion data as requested in Section V. B & C and Section VII of the 1994 Annual Employment Report.

[156] NAACP's pleading is styled as a "Comments and Petition for Further Rule Making." We reject UCC's request that we expand this particular rule making.

that we use this opportunity to seek a Memorandum of Understanding with the Equal Employment Opportunity Commission and the Department of Labor's Office of Federal Contract Compliance Programs in order to streamline the various federal EEO reporting requirements and filing dates with which cable entities, as employers, must comply.[157] The scope of this rule making proceeding is limited only to the specific EEO provisions of the Cable Act of 1992. The requests from members of the cable industry to seek a Memorandum of Understanding as well as many of the suggestions from NAACP and UCC[158] are unrelated to the specific EEO provisions of the Cable Act of 1992 and are, therefore, beyond the scope of this proceeding. Accordingly, we will not consider these requests herein.[159]

IV. CONCLUSION

51. By this *Report and Order*, we amend our rules to implement the EEO provisions of the Cable Television Consumer Protection and Competition Act of 1992.

V. ADMINISTRATIVE MATTERS

A. Regulatory Flexibility Analysis

52. The Commission's final regulatory flexibility analysis for this *Report and Order* is set forth in Appendix A.

B. Ordering Clauses

53. Accordingly, IT IS ORDERED that pursuant to the authority contained in Section 4(i) and (j), and 303 of the Communications Act of 1934, as amended, and the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, Parts 1, 21, 25, 73, 74, 76 and 100 of the Commission's rules, 47 C.F.R. Parts 1, 21, 25, 73.[160] 74, 76 and 100 are AMENDED as set forth in Appendix B.

54. IT IS FURTHER ORDERED that the amendment to Parts 1, 21, 25, 73, 74, 76 and 100 of these rules as set forth in Appendix B of this *Report and Order* will be EFFECTIVE thirty (30) days from the date this *Report and Order* is published within the Federal Register.

55. IT IS FURTHER ORDERED that the amendments to the Form 395-A as set forth in Appendix D of this *Report and Order* will be EFFECTIVE ninety (90) days from the date this *Report and Order* is published within the Federal Register.[161]

56. IT IS FURTHER ORDERED that the Petition for Further Rule Making filed by NAACP on February 17, 1993, IS DENIED.

57. IT IS FURTHER ORDERED that this rulemaking proceeding, MM Docket No. 92-261, IS TERMINATED.

C. Additional Information

58. For further information on this proceeding, contact Lisa M. Higginbotham, Mass Media Bureau, Enforcement Division at (202) 632-7069.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

Final Regulatory Flexibility Analysis

Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

I. *Need and purpose of this action.* This action is taken to implement the equal employment opportunity (EEO) provisions of the Cable Television Consumer Protection and Competition Act of 1992.

II. *Summary of issues raised by comments in response to the Initial Regulatory Flexibility Analysis.* No comments were received in response to the request for comments to the Initial Regulatory Flexibility Analysis. However, comments received in response to the Notice of Proposed Rule Making indicate that smaller cable systems are concerned about the administrative impact of the EEO reporting requirements. One commenter suggested that we eliminate redundant reporting requirements or streamline EEO reporting forms for small cable systems.

III. *Significant alternatives considered and rejected.* The Act streamlines reporting requirements for small cable entities which employ fewer than six full-time employees. Cable entities, which employ six or more full-time employees, must comply with all of the EEO reporting requirements. Thus, we find no reason to provide a more streamlined reporting form for small cable operators as one commenter suggests. We have, however, revised our Form 395-A to require less information than that proposed in the *Notice*. We believe that this revised form complies with the 1992 Cable Act, collects sufficient data to ascertain EEO compliance; and imposes a minimum burden on cable operators.

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[157] *See e.g.*, Continental Comments, at 5; NCTA Comments, at 10-11; TCI Comments, at 4-6; Time Warner Comments, at 13; CTHRA Reply Comments, at 5; Joint Parties Reply Comments, at 5-6. We deny Time Warner's request that we treat its suggestion as a Petition for Further Rule Making.

[158] We have considered the suggestions from NAACP and UCC to the extent that they relate to the specific EEO provisions of the Cable Act of 1992.

[159] The Commission may consider these suggestions at a later time. Section 22(g) of the 1992 Cable Act requires the Commission, within two years of the date of the statute's enactment, to present a report to Congress regarding its EEO enforcement program for both the broadcast and cable industries. *See* Section 22(g) of the 1992 Cable Act.

[160] The first group of broadcast television stations which will be subject to the mid-term review will be those stations whose group expiration dates occurred on October 1, 1991. This group includes those broadcast television stations located in the District of Columbia, Maryland, Virginia, and West Virginia.

[161] The revised Form 395-A is subject to approval by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980.

APPENDIX B

Parts 1, 21, 25, 73, 74, 76 and 100 of Chapter I of Title 47 of the Code of Federal Regulations are amended as follows:

PART 1 -- PRACTICE AND PROCEDURE

1. The Authority Citation for Part 1 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303; Implement, 5 U.S.C. 552, unless otherwise noted.

2. Paragraph (c) is added to Section 1.815 to read as follows:

§1.815 Reports of annual employment.

* * * * *

(c) *Cross References.*

(1) *Applicability of Cable Television EEO Reporting Requirements to MDS and MMDS facilities*, see §21.920 of this Chapter.

(2) *Applicability of Cable Television EEO Reporting Requirements for FSS facilities*, see §25.601 of this Chapter.

PART 21 -- DOMESTIC PUBLIC FIXED RADIO SERVICES

3. The Authority Citation for Part 21 is revised to read as follows:

AUTHORITY: Secs. 1, 2, 4, 201-205, 208, 215, 218, 303, 307, 313, 403, 404, 410, 602, 48 Stat. as amended, 1064, 1066, 1070-1073, 1076, 1077, 1080, 1082, 1083, 1087, 1094, 1098, 1102; 47 U.S.C. 151, 154, 201-205, 208, 215, 218, 303, 307, 313, 314, 403, 404, 602; 47 U.S.C. 552, 554.

4. Paragraph (g) is added to Section 21.307 to read as follows:

§21.307 Equal employment opportunities.

* * * * *

(g) *Cross Reference.* Applicability of Cable Television EEO Requirements to MDS and MMDS facilities, see §21.920 of this Part.

5. Section 21.920 is added to Subpart K to read as follows:

§21.920 Applicability of Cable Television EEO Requirements to MDS and MMDS Facilities.

Notwithstanding other EEO provisions within these rules, an entity that uses an owned or leased MDS, MMDS and/or ITFS facility to provide more than one channel of video programming directly to the public must comply with the equal employment opportunity requirements set forth in Part 76, Subpart E of this Chapter, if such entity exercises control (as defined in Part 76, Subpart E of this Chapter) over the video programming it distributes.

PART 25 -- SATELLITE COMMUNICATIONS

Subpart I - Equal Employment Opportunities 25.601 Equal employment opportunity requirement.

6. The Authority Citation for Part 25 is revised to read as follows:

AUTHORITY: §§25.101 to 25.601 issued under Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154. Interpret or apply secs. 101-104, 76 Stat. 419-427; 47 U.S.C. 701-744; 47 U.S.C. 554.

7. Part 25 is amended by adding Subpart I and Section 25.601 to read as follows:

SUBPART I - EQUAL EMPLOYMENT OPPORTUNITIES

§ 25.601 Equal employment opportunity requirement.

Notwithstanding other EEO provisions within these rules, an entity that uses an owned or leased fixed satellite service facility (operating under this Part) to provide more than one channel of video programming directly to the public must comply with the equal employment opportunity requirements set forth in Part 76, Subpart E of this Chapter, if such entity exercises control (as defined in Part 76, Subpart E of this Chapter) over the video programming it distributes.

PART 73 -- RADIO BROADCAST SERVICES

5. The Authority Citation for Part 73 is revised to read as follows:

AUTHORITY: 47 U.S.C. 154, 303, 334.

6. Paragraph (d) is added to Section 73.2080 to read as follows:

§73.2080 Equal employment opportunities.

* * * * *

(d) *Mid-term Review for Television Broadcast Stations.* The Commission will conduct a mid-term review of the employment practices of each broadcast television station at two and one half years following the station's most recent license expiration date as specified in Section 73.1020 of these rules. The Commission will use the employment profile information provided on the first two Form 395-B reports submitted following such license expiration date to determine whether television station's employment profiles as compared to the applicable labor force data, are in compliance with the Commission's processing criteria. Television broadcast stations which employment profiles fall below the processing criteria will receive a letter noting any necessary improvements identified as a result of the review.

PART 74 -- EXPERIMENTAL, AUXILIARY, AND SPECIAL BROADCAST AND OTHER PROGRAM DISTRIBUTIONAL SERVICES

7. The Authority Citation for Part 74 is revised to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, as amended, 1082, as amended; 47 U.S.C. 154, 303, 554.

8. Section 74.996 is added to Subpart I to read as follows:

§74.996 Applicability of Cable EEO Requirements to ITFS Facilities.

Notwithstanding other EEO provisions within these rules, an entity that uses an owned or leased MDS, MMDS and/or ITFS facility to provide more than one channel of video programming directly to the public must comply with the equal employment opportunity requirements set forth in Part 76, Subpart E of this Chapter, if such entity exercises control (as defined in Part 76, Subpart E of this Chapter) over the video programming it distributes. With respect to the use of an ITFS facility, the EEO provisions set forth in Part 76, Subpart E do not apply to an accredited institution or government organization engaged in the formal education of enrolled students or to a nonprofit organization whose purposes are educational and include providing educational and instructional television material to such accredited institutions and governmental organizations.

PART 76 -- CABLE TELEVISION SERVICE

9. The Authority Citation for Part 76 is revised to read as follows:

AUTHORITY: Sec. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat., as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085, 1101; 47 U.S.C. Secs. 152, 153, 154, 301, 303, 307, 308, 309; 532; 533; 535; 542; 543; 552; 554, as amended, 106 Stat. 1460.

10. Paragraph (a) of Section 76.71 is revised to read as follows:

§76.71 Scope of application.

(a) The provisions of this subpart shall apply to any corporation, partnership, association, joint-stock company, or trust engaged primarily in the management or operation of any cable system. Cable entities subject to these provisions include those systems defined in §76.5(a) of the rules, all satellite master antenna television systems serving 50 or more subscribers, and any multichannel video programming distributor. For purposes of the provisions of this subpart, a multichannel video programming distributor is an entity such as, but not limited to, a cable operator, a multipoint distribution service, a multichannel multipoint distribution service, a direct broadcast satellite service, a television receive-only satellite program distributor, or a video dialtone program service provider, who makes available for purchase, by subscribers or customers, multiple channels of video programming, whether or not a licensee. Multichannel video programming distributors do not include any entity which lacks control over the video programming distributed. For purposes of this subpart, an entity has control over the video programming it distributes, if it selects video programming channels or programs and determines how they are presented for sale to consumers. Notwithstanding the foregoing, these rules are not applicable to the owners or originators (of programs or channels of programming) that distribute six or fewer channels of commonly-owned video programming over a leased transport facility. For purposes of this subpart, programming services are "commonly-owned" if the same entity holds a majority of the stock (or is a general partner) of each program service.

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11. Paragraph (d) is added to Section 76.77 to read as follows:

§76.77 Reporting Requirements.

* * * * *

(d) *Job Category Definitions.* The following job category definitions are to be used when classifying employees for purposes of this section:

(1) *Corporate Officers.* An employee who is responsible for setting broad policies for the overall operation of the company and who holds a corporate office as designated by the company's governing regulations (*e.g.*, Articles of Incorporation, Articles of Partnership, By-Laws). Examples of positions which may fall within this category include, Chairman of the Board, President and Vice President.

NOTE: Employees who perform responsibilities falling within the "Corporate Officers" and another of the job categories (2) through (6), should normally be classified in only one of the categories (2) through (6). Specific job titles for categories (1) through (6) are merely illustrative. The proper categorization of any employee depends on the kind and level of the employee's responsibilities and not merely the employee's title. Employees who are appropriately classified into one of the categories (1) through (6) also should fall within category (7).

(2) *General Manager.* An employee who exercises overall responsibility for a cable unit or system. Related title may include "systems manager."

(3) *Chief Technician.* An employee who has overall responsibility for the system's technical operations. The incumbent ordinarily oversees technical budgets and expenditures, inventory control and fleet management. Individual ordinarily supervises technical personnel in the installation, service, maintenance and construction departments and/or studio. Category includes related titles such as "Technical Operations Manager," "Technical Manager," "Plant Manager," or "Chief Engineer."

(4) *Comptroller.* An employee who manages the activities of the accounting department in the maintenance of the accounting book and other such records.

(5) *General Sales Manager.* A senior sales or marketing employee who oversees the marketing functions of the system which may include telemarketing in addition to direct sales.

(6) *Production Manager.* A senior employee responsible for advertising and/or production of local community programming.

NOTE: An employee whose responsibilities fall within more than one of the job categories (2) through (6). (i.e., General Manager/Comptroller), should be listed in the one job category which represents the most frequently performed task by that person.

(7) *Managers.* Occupations requiring administrative personnel who set broad policies, exercise overall responsibility for execution of these policies, and direct individual departments or special phases or segments of a firm's operation or subdepartments of a major department. Incumbents within this category ordinarily exercise authority to hire and terminate employees. This category would include systems managers and assistant managers, program directors and assistant directors, office managers, budget officers, promotions managers, public affairs directors, chief engineers and those holding equivalent positions. Employees appropriately falling within categories (1) through (6) also should fall within this category.

(8) *Professionals.* Occupations requiring either college graduation or experience of such kind and amount as to provide a comparable background. Includes: accountants and auditors, editors, engineers, lawyers and labor relations specialists. This category would include persons engaged in the writing, preparation and reproduction of programming, writers or editors, producers and directors of programs, floor directors, announcers, singers, actors, music librarians and those in similar positions.

(9) *Technicians.* Occupations requiring a combination of basic scientific knowledge and manual skill which can be obtained through about 2 years of post high school education, such as is offered in many technical institutes and junior colleges, or through equivalent on-the-job training. Includes: computer programmers and operators, engineering aides, junior engineers and electronic technicians. This category also would include strand mappers, audio and video engineers, camera technicians (live or film), film processors, light technicians, drafters and design personnel, electronic converter repair technicians (technicians who perform more than clear and recycle functions) and advertising sales production personnel.

(10) *Sales.* Occupations engaging wholly or primarily in direct selling. This category would include advertising agents, cable service sales personnel (sales representatives), and individuals engaged in direct customer contact for the purposes of product and service promotion. This category includes employees who ordinarily are paid by commissions.

(11) *Office and Clerical.* Includes all clerical-type work regardless of level of difficulty, where the activities are predominantly nonmanual though some manual work not directly involved with altering or transporting the products is included. Includes: bookkeepers, cashiers, collectors of bills and accounts, messengers and clerks, office machine operators, stenographers, typists and secretaries, telephone operators, kindred workers and customer service representatives.

(12) *Craft Workers (skilled).* Manual workers of relatively high skill level having a thorough and comprehensive knowledge of the processes involved in their work. Exercise considerable independent judgment and usually receive an extensive period of training. Includes: hourly paid supervisors who are not members of management, mechanics, and repair workers, electricians, motion picture projectionists, and splicers.

(13) *Operatives (semi-skilled).* Workers who operate machine or processing equipment or perform other factory-type duties of intermediate skill level which can be mastered in a few weeks and require only limited training. Includes: apprentices, operatives, truck and tractor drivers, welders, installers, line workers, and trenching machine workers.

NOTE: Apprentices -- Persons employed in a program including work training and related instruction to learn a trade or craft which is traditionally considered an apprenticeship regardless of whether the program is registered with a Federal or State agency.

(14) *Laborers (unskilled).* Workers in manual occupations which generally require no special training. Perform elementary duties that may be learned in a few days and require the application of little or no independent judgment. Includes: gardeners and groundskeepers, laborers performing lifting or digging, stage hands and kindred workers.

(15) *Service Workers.* Workers in both protective and nonprotective service occupations. Includes: char workers and cleaners, elevator operators, guards and watch workers, janitors, and kindred workers.

NOTE: A person who does a job falling within more than one of the job categories listed (7) through (15) is to be listed in the job category which represents the most frequently performed task by that person; a person is to be listed only once. Specific job titles listed in the categories above are merely illustrative. The proper categorization of any employee depends on the kind and level of the employee's responsibilities.

PART 100 -- DIRECT BROADCAST SATELLITE SERVICE

12. The Authority Citation for Part 100 is revised to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, 554.

13. Paragraph (e) is added to Section 100.51 to read as follows:

§100.51 Equal employment opportunities.

* * * * *

(e) Notwithstanding other EEO provisions within these rules, an entity that uses an owned or leased DBS facility operating under this Part to provide more than one channel of video programming directly to the public must comply with the equal employment opportunity requirements set forth in Part 76, Subpart E of this Chapter, if such entity exercises control (as defined in Part 76, Subpart E of this Chapter) over the video programming it distributes.

APPENDIX C

List of Comments

Comments

1. Bell Atlantic Telephone Companies
2. Cablevision Industries, Inc.; Multimedia Cablevision, Inc.; Multivision Cable TV Corporation, Providence Journal Company; and Sammons Communications, Inc.
3. Century Communications Corporation; TeleCable Corporation; KBLCOM, Inc.; Columbia International, Inc.; Western Communications, Inc.; Greater Media, Inc.; Helicon Corporation; Acton Cable Partnership; Rock Associates; Monmouth Cablevision; Allen's Television Cable Service, Inc.; Frederick Cablevision, Inc.; Gilmer Cable Television Company, Inc.; Halcyon Group, Inc.; Zylstra Communications Corporation; Cable Television Association of Maryland, Delaware and the District of Columbia; Florida Cable Television Association; Texas Cable Television Association; and West Virginia Cable Television. (Represented by Cole, Raywid, and Braverman).
4. Consortium of Small Cable Television Companies
5. Continental Cablevision
6. GTE Service Corporation
7. National Association for the Advancement of Colored People
8. National Association of Broadcasters
9. National Cable Television Association
10. New York State Commission on Cable Television
11. Office of Communications of the United Church of Christ
12. Tele-Communications, Inc.
13. Time Warner Cable TV Corporation
14. Wireless Cable Association

Reply Comments

1. Cable Television Human Resources Association
2. Comcast Corporation; Jones Intercable, Inc.; Newhouse Broadcasting Corporation
3. GTE Service Corporation
4. National Association of Broadcasters
5. National Cable Television Association
6. Office of Communications of the United Church of Christ
7. Tele-Communications, Inc.
8. Time Warner Cable TV Corporation

Post-Reply Comment Filings

1. The Honorable Cardiss Collins, U.S. House of Representatives
2. Equal Employment Opportunity Commission
3. National Cable Television Association

APPENDIX D

INSTRUCTIONS FOR COMPLETING
FCC FORM 395-A

YOU ARE STRONGLY ADVISED TO CONSULT THE COMMISSION'S CABLE EEO RULES BEFORE COMPLETING THIS FORM
47 CFR Section 76.71 et seq.

General Instructions

Supply the requested information for the unit identified by the EEO ID number appearing on the attachment containing FCC provided labor force totals for that unit. If the unit is to submit a Supplemental Investigation Sheet (SIS), one will be attached to the form and an X will appear in the brackets before "Supplemental Investigation Sheet Attached" located in the box "For FCC Use Only" on page 1 of the form. If the unit no longer exists due to consolidation with another unit, or is no longer under your control, attach as Exhibit A an explanation and proceed to Section IX.

Section I

A. In addition to the unit operator's legal name, supply, if applicable, the name of the MSO owning or controlling the operator.

B. Supply the address to which you want correspondence sent.

C. Supply the county and state of the unit's principal employment office.

D. A full-time employee is one who works 30 or more hours per week.

E. Insert the payroll period in January, February or March used for this year's report. The payroll period must correspond to the same payroll period used for last year's report unless you obtain permission from the FCC's EEO Branch to use a different payroll period.

F. Place an X in the appropriate brackets for each possible exhibit.

Section II

Submit as Exhibit A a list of communities added to or deleted from the unit, using the format provided. To obtain this information, review the prior year's form for the unit, noting the communities then comprising the unit, and comparing that list with the names of the communities now comprising the unit.

Section III

Carefully answer each of the nine (9) questions by checking either *Yes* or *No*. If the answer is No, attach as Exhibit B an explanation.

Section IV

You may attach at Exhibit C any additional information you believe useful in the FCC's evaluation of your EEO efforts. There is no requirement to provide such information.

Section V

A. Report all permanent, not temporary, employees, both full-time and part-time, in the appropriate job categories, listed by gender and race, color or national origin.

Job Category Definitions

Managers -- Occupations requiring administrative personnel who set broad policies, exercise overall responsibility for execution of these policies, and direct individual departments or special phases or segments of a firm's operations or subdepartments of a major department. Incumbents within this category ordinarily exercise authority to hire and terminate employees. This category would include systems managers and assistant managers, program directors and assistant directors, office managers, budget officers, promotion managers, public affairs directors, chief engineers and those holding equivalent positions. Employees whose occupations fall within the Corporate Officers, General Manager, Chief Technician, Comptroller, General Sales Manager, and Production Manager categories also should be listed under this category.

Professionals -- Occupations requiring either college graduation or experience of such kind and amount as to provide a comparable background. Includes: accountants and auditors, editors, engineers, lawyers and labor relations specialists. This category would include persons engaged in the writing, preparation and reproduction of programming; writers and editors, producers and directors of programs, floor directors, announcers, singers, actors, music librarians and those in similar positions.

Technicians -- Occupations requiring a combination of basic scientific knowledge and manual skill which can be obtained through about 2 years of post high school education, such as offered in many technical institutes and junior colleges, or through equivalent on-the-job training. Includes: computer programmers and operators, engineering aides, junior engineers and electronic technicians. This category would include strand mappers, audio and video engineers, camera technicians (live or

film), film processors, light technicians, drafters and design personnel, electronic converter repair technicians (technicians who perform more than clear and recycle functions) and advertising sales production personnel.

Sales -- Occupations engaging wholly and primarily in direct selling. This category would include advertising agents, cable service sales personnel (sales representatives), and individuals engaged in direct customer contact for the purposes of product and service promotion. This category includes employees who ordinarily are paid by commissions.

Office and Clerical -- Includes all clerical-type work regardless of level of difficulty, where the activities are predominantly nonmanual though some manual work not directly involved with altering or transporting the products is included. Includes: bookkeepers, cashiers, collectors of bills and accounts, messengers and clerks, office machine operators, stenographers, typists and secretaries, telephone operators, kindred workers and customer service representatives.

Craft Workers (skilled) -- Manual workers of relatively high skill level having a thorough and comprehensive knowledge of the processes involved in their work. Exercise considerable independent judgment and usually receive an extensive period of training. Includes: hourly paid supervisors who are not members of management, mechanics and repair workers, electricians and motion picture projectionists, and splicers.

Operatives (semi-skilled) -- Workers who operate machine or processing equipment or perform other factory-type duties of intermediate skill level which can be mastered in a few weeks and require only limited training. Includes: apprentices,[1] operatives, truck and tractor drivers, welders, installers, line workers, and trenching machine operators.

Laborers (unskilled) -- Workers in manual occupations which generally require no special training. Perform elementary duties that may be learned in a few days and require the application of little or no independent judgment. Includes: gardeners and groundskeepers, laborers performing lifting or digging, stage hands and kindred workers.

---

[1] Apprentices -- Persons employed in a program including work training and related instruction to learn a trade or craft which is traditionally considered an apprenticeship regardless of whether the program is registered with a Federal or State agency.

Service Workers -- Workers in both protective and nonprotective service occupations. Includes: char workers and cleaners, elevator operators, guards and watch workers, janitors, and kindred workers.

> NOTE: A person who does more than one job is to be listed in the job category which represents the most frequently performed task by that person; a person is to be listed only once in this section. Specific job titles listed in the categories above are merely illustrative. The proper categorization of any employee depends on the kind and level of the employee's responsibilities.

Minority Group Identification

(a) Minority group information necessary for this section may be obtained either by visual surveys of the workforce, or from post-employment records as to the identity of employees. An employee may be included in the minority group to which he or she appears to belong, or is regarded in the community as belonging.

(b) Since visual surveys are permitted, the fact that minority group identifications are not present on company records is not an excuse for failure to provide the data called for.

(c) Conducting a visual survey and keeping post-employment records of the race or ethnic origin of employees is legal in all jurisdictions and under all Federal and State laws. State laws prohibiting inquiries and recordkeeping as to race, etc., relate only to applicants for jobs, not to employees.

Race/Ethnic Categories

(b & g) White, not of Hispanic Origin -- A person having origins in any of the original peoples of Europe, North Africa, or the Middle East.

(c & h) Black, not of Hispanic Origin -- A person having origins in any of the black racial groups of Africa.

(d & i) Hispanic -- A person of Mexican, Puerto Rican, Cuban, Central of South American or other Spanish Culture or origin, regardless of race.

(e & j) Asian or Pacific Islander -- A person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent, or in the Pacific Islands. This area includes, for example, China, Japan, Korea, the Philippines and Samoa.

(f & k) American Indian or Alaskan Native -- A person having

origins in any of the original peoples of North American, and who maintain cultural identification through tribal affiliation or community recognition.

B. & C. For employee promotion (B) and job hire (C) data, use figures for the twelve months preceding the payroll period used for the statistical profile (A). For example, if the payroll period for the statistical profile is March 1 through March 13, the employee promotion and job hire data should cover the period beginning March 14 of the prior year, through March 13 of the year of the report.

Section VI

On the attachment to the form, labor force for Section A, Line 10 (Total), will be provided by the FCC for each unit. If you supply alternative data, give the source of those data and attach as Exhibit D an explanation as to why your data is more germane than the FCC data.

Section VII

Based on the same payroll period used for Section V.A., report all permanent, not temporary, employees both full-time and part-time, in the appropriate job sub-categories, listed by gender and race, color or national origin. For promotion and job hire data, use figures for the same twelve month period used in Section V. B. and C.

Job Category Definitions

Corporate Officers -- An employee who is responsible for setting broad policies for the overall operation of the company and who holds a corporate office as designated in the company's governing regulations (e.g., Articles of Incorporation, Articles of Partnership, By-Laws). Examples of positions falling within this category may include, Chairman of the Board, President and Vice-President.

> NOTE: A person whose responsibilities fall within the Corporate Officers category and one of the five succeeding job categories (i.e. Vice President and General Sales Manager) should normally be reported in one of the succeeding categories. A person should be reported in only one sub-category.

General Manager -- An employee who exercises overall responsibility for a cable unit or system. Related title may include "systems manager."

Chief Technician -- An employee who has overall responsibility for the system's technical operations. The incumbent ordinarily

oversees technical budgets and expenditures, inventory control and fleet management. Individual ordinarily supervises technical personnel in the installation, service, maintenance and construction departments and/or studio. Category includes related titles such as "Technical Operations Manager," "Technical Manager," "Plant Manager," or "Chief Engineer."

Comptroller -- An employee who manages the activities of the accounting department in the maintenance of the accounting book and other such records.

General Sales Manager -- A senior sales or marketing employee who oversees the marketing functions of the system which may include telemarketing in addition to direct sales.

Production Manager -- A senior employee responsible for advertising and/or production of local community programming.

> NOTE: A person is to be listed in the one category which represents the most frequently performed task by that person. Specific job titles listed in the categories above are merely illustrative. The proper categorization of any employee depends on the kind and level of the employee's responsibilities.

Section VIII

Provide a list, by job title within each of the 15 job categories, of the employees reported in Sections V.A and VII. This list should include: the job title; the job category for each job title; the full or part-time status of each position; the gender of the employee holding the position; and the race or national origin of the employee holding the position. Job titles may be listed in any order. Job title data must be provided for all of the 15 job categories. Please list the full title of each position (e.g., Vice President and General Sales Manager).

The total number of positions reported on this list should equal the total number of employees reported in Section V.A.

Computer-generated lists may be submitted in lieu of the FCC-provided form. However, such lists must contain all of the information requested in these instructions. If you decide to submit a computer-generated list, use the FCC-provided form as a format reference.

Cable Television Annual Employment Report

FCC FORM 395-A

Submit the original and one copy by May 1 to:

Federal Communications Commission
Room 7218
Washington, D.C. 20554

For FCC Use Only
Emp. Unit ID # _____
( ) Supplemental Investigation Sheet (SIS) Attached

SECTION I IDENTIFYING INFORMATION

A. Name of Operator: _____

MSO Name: _____

B. Employment Unit's Mailing Address

_____

_____

C. County and State in which unit's employment office is located

_____

D. Category of Respondent (check applicable box)

( ) Fewer than six (6) full-time employees during the selected payroll period: Complete Sections I, II and VII

( ) Six (6) or more full-time employees during the selected payroll period: Complete ALL sections of the Form 395-A and the Supplemental Investigation Sheet, if attached

E. Pay Period Covered by this Report (Inclusive dates)

_____

F. Attachments: (Check applicable boxes)

Not Applicable	Attached	Exhibit - For:
( )	( )	A-Section II
( )	( )	B-Section III
( )	( )	C-Section IV
( )	( )	D-Section VI
( )	( )	E-SIS - Job Descriptions
( )	( )	F-SIS Narrative Responses

SECTION II COMMUNITY INFORMATION

System Communities Comprising Local Employment Unit

Ident No.	Name of Community	Location (State)	Type

Review the list of communities served on the previous year's submission and attach as Exhibit A any additions or deletions, using the format noted above.

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SECTION III EEO POLICY AND PROGRAM REQUIREMENTS

Check YES or NO to each of the following questions. If answer to any question below is NO, attach as EXHIBIT B an explanation.

YES	NO		
( )	( )	1.	Do you disseminate your EEO Program to job applicants, employees, and those with whom you regularly do business?
( )	( )	2.	Do you contact minority organizations, women's organizations, media, educational institutions, and other potential sources of minority and female applicants for referrals whenever job vacancies are available in your organization?
( )	( )	3.	Do you evaluate your employment profile and job turnover against the availability of minorities and women in your franchise area?
( )	( )	4.	Do you undertake to offer promotions to positions of greater responsibility to minorities and women in a nondiscriminatory manner?
( )	( )	5.	To the extent possible, do you seek out minority and female entrepreneurs and encourage them to conduct business with all parts of your organization?
( )	( )	6.	Do you analyze the results of your efforts to recruit, hire, promote, and use the services of minorities and women and use these results to evaluate and improve your EEO Program?
( )	( )	7.	Do you define the responsibility of each level of management to ensure a positive application and vigorous enforcement of your policy of equal employment opportunity and maintain a procedure to review and control managerial and supervisory performance?
( )	( )	8.	Do you conduct a continuing program to exclude every form of prejudice or discrimination based upon race, color, religion, national origin, age, or sex from your personnel policies and practices and working conditions?
( )	( )	9.	Do you conduct a continuing review of job structure and employment practices and maintain positive recruitment training, job design, and other measures needed to ensure genuine equality of opportunity to participate fully in all organizational units, occupations, and levels of responsibility?

SECTION IV ADDITIONAL INFORMATION

You may provide as Exhibit C any additional information that you believe might be useful in evaluating your efforts to comply with the Commission's EEO provisions. There is no requirement to provide additional data or information.

SECTION V EMPLOYEE DATA

SECTION VI AVAILABLE LABOR FORCE AND OCCUPATIONAL AVAILABILITY DATA

A. Full-Time and Part-Time Paid Employee Data

	JOB CATEGORIES	TOTAL (b-k) (a)	MALE					FEMALE					Women (A)	Blacks (B)	Hispanics (C)	Asian (D)	American Indian (E)
			White (Not Hispanic) (b)	Black (Not Hispanic) (c)	Hispanic (d)	Asian or Pacific Islander (e)	American Indian, Alaskan Native (f)	White (Not Hispanic) (g)	Black (Not Hispanic) (h)	Hispanic (i)	Asian or Pacific Islander (j)	American Indian, Alaskan Native (k)					
1.	Officials & Managers																
2.	Professionals																
3.	Technicans																
4.	Sales Workers																
5.	Office and Clerical																
6.	Craft Workers (Skilled)																
7.	Operatives (Semi-skilled)																
8.	Laborers (Unskilled)																
9.	Service Workers																
10.	Total																

SOURCE: Name of area: (e.g., Adams County, PA, or New York City PMSA)

B. Employee Promotions By Upper Four Job Categories and Total (Data for 12 months)

UPPER-FOUR (1-4)												
TOTAL (1 - 9)												

Attach as Exhibit D reasons for use of other labor force data

C. Job Hires By Upper Four Job Categories and Total (Data for 12 months)

UPPER-FOUR (1-4)												
TOTAL (1 - 9)												

Emp. Unit ID # _____

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SECTION VII EMPLOYMENT, PROMOTION AND HIRING DATA FOR SENIOR UPPER-LEVEL JOB SUB-CATEGORIES.

		MALES						FEMALES				
		TOTAL (b-k)	WHITE (Not Hisp-anic)	BLACK (Not Hisp-anic)	HISP-ANIC	ASIAN/ PACI-FIC ISLAND	AMERI-CAN INDIAM ALAS-KA NATIVE	WHITE (Not Hisp-anic)	BLACK (Not Hisp-anic)	HISP-ANIC	ASIAN/ PACI-FIC ISLAND	AMERI-CAN INDIAM ALAS-KA NATIVE
		(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)	(k)
CORPORATE OFFICERS	Employees											
	Promotions											
	Hires											
GENERAL MANAGER	Employees											
	Promotions											
	Hires											
CHIEF TECHNICIAN	Employees											
	Promotions											
	Hires											
COMPTROLLER	Employees											
	Promotions											
	Hires											
GENERAL SALES MANAGER	Employees											
	Promotions											
	Hires											
PRODUCTION MANAGER	Employees											
	Promotions											
	Hires											

SECTION VIII JOB TITLE INFORMATION

JOB TITLE	JOB CATEGORY	FULL-TIME OR PART-TIME STATUS	GENDER	RACE OR NATIONAL ORIGIN

SECTION IX CERTIFICATION

This Report must be certified as follows:

A. By the individual owning the reporting system if individually owned;

B. By a partner, if a partnership; or

C. By an officer, if a corporation or association.

I certify that to the best of my knowledge, information and belief, all statements contained in this report are true and correct.

Signed _____ Title _____

Date _____ Name of Respondent _____

Telephone No. (include area code)_____

WILLFUL FALSE STATEMENTS MADE ON THIS FORM ARE PUNISHABLE BY FINE AND/OR IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001), AND/OR REVOCATION OF ANY STATION LICENSE (U.S. CODE, TITLE 47, SECTION 312(a)(1), AND/OR FORFEITURE (U.S.CODE, TITLE 47, SECTION 503).

FCC NOTICE TO INDIVIDUALS REQUIRED BY THE PRIVACY ACT AND THE PAPERWORK REDUCTION ACT

The solicitation of personal information requested in this Report is authorized by the Communications Act of 1934, as amended. The Commission will use this information to assess a cable unit's efforts to afford equal employment opportunity in employment. In reaching that determination, or for law enforcement purposes, it may become necessary to refer personal information contained in this form to another government agency. In addition, all information provided in this form is available for public inspection. If information requested on this form is not provided, processing of the application may be delayed while a request is made to provide the missing information. Your response is required to obtain the requested benefit.

THE FOREGOING NOTICE IS REQUIRED BY THE PRIVACY ACT OF 1974, P.L. 95-579, DECEMBER 31, 1974, 5 U.S.C. 552a(e)(3) AND THE PAPERWORK REDUCTION ACT OF 1980, P.L. 96-511, DECEMBER 11, 1980, 44 U.S.C. 3507.

Separate Statement

of

Commissioner Andrew C. Barrett

Re: Report and Order Implementing Section 22 of the 1992 Cable Act-- Equal Employment Opportunities [EEO] [MM Docket No. 92-261]

I support this Report and Order implementing the Cable EEO rules from the 1992 Cable Act. I am particularly encouraged that the rules will allow the Commission to assess the ongoing recruitment efforts of multichannel video program distributors [MVPD], as necessary. The Order specifies that MVPD entities will need to provide necessary information on their recruiting efforts where the Commission requests such information. I also support the Commission's determination that the Cable EEO rules apply to any MVPD with 2 or more channels. Consistent with the Act, this action affirms that cable, DBS, TVRO and wireless cable entities are subject to our Cable Act EEO requirements.

Due to the implications of video dialtone and common carrier Direct Broadcast Satellite operations, multichannel program packagers also become subject to the jurisdiction of our Cable EEO rules. To the extent a limited number of programming channels [i.e.6] are commonly owned by a programming service, I do not believe these rules should capture those entities. Allowing an exemption for programming only services with 6 or less commonly owned channels is consistent with my reading of the Act. If program packagers offer 2 or more channels that are not commonly owned, then they are subject to Cable EEO requirements. If more than 6 commonly owned program channels are offered over an MVPD platform, I also believe the Commission must be concerned about the impact of this program distribution. Thus, Cable EEO rules should apply. I support the Order in this regard.

Finally, although video dialtone providers are currently exempted from Cable EEO rules, the FCC should revisit this issue if we find that video dialtone providers have greater control over program selection or distribution on their platform as market operations evolve.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 4, 1993

FEE DECISIONS OF THE MANAGING DIRECTOR AVAILABLE TO THE PUBLIC

The Managing Director is responsible for fee decisions in response to requests for waiver or deferral of fees as well as other pleadings associated with the fee collection process. On a monthly basis, a public notice is released and the entire text of these fee decisions is published in the FCC Record.

The decisions are placed in General Docket 86-285 and are available for public inspection. A copy of the decision is also placed in the appropriate docket, if one exists.

The following Managing Director fee decisions are released for public information:

Central Television, Inc. - Request for refund of a hearing fee for a television station at Meridian, Mississippi - **Denied** (July 2, 1993).

Cox, Roderick M. - Request for refund of a filing fee for a new FM station at New London, Missouri - **Denied** (June 30, 1993).

Dade City Broadcasting, Inc. - Request for refund of a hearing fee for a new FM radio station at Dade City, Florida - **Granted** (July 2, 1993).

Fitzgerald, Charles - Request for refund of a hearing fee for a new television station at Jacksonville, North Carolina - **Granted** (July 7, 1993).

Hovermale, Jean M. & Harvin, Christine d/b/a Summer Town Partners - Request for refund of a hearing fee for a new FM station at Summerton, South Carolina - **Granted** (July 9, 1993).

LaVanway, Kim; Rooney, Brian; Trieble, Amy; Ronlund, Roberta; and Heffelfinger, Steven - Request for reconsideration and reinstatement of applications filed for licenses in the Interactive Video Data Service for service areas 002, 003, 004, 006, 007, 008, 009 and 010 - **Granted** (June 15, 1993).

Marsh, Richard C. & Richard E. - Request for refund of a filing fee for two stations at Barbara, California - **Denied** (July 2, 1993).

McNaughton, Charlotte - Request for ruling on whether an additional fee must be submitted to cover the application to modify the existing construction permit for an FM station at Newport, Oregon - **Granted** (June 30, 1993).

Orange County Broadcasting Corp. and BueneVentura Communications, Inc. - Request for refund of a hearing fees for a AM stations at Orange, California and Thousand Oaks, California, respectively - **Granted** (June 30, 1993).

Rickenbacker, Robert Carroll - Request for refund of hearing fee for a new FM station at Bowman, South Carolina - **Granted** (June 30, 1993).

Rodgers, Patricia - Request for refund of a filing fee for a new FM station at Campbellsville, Kentucky - **Denied** (July 19, 1993).

Shepherd, David J. - Request for refund of a hearing fee for a new FM station at Dublin, Texas - **Denied** (July 2, 1993).

Trentadue, Scott M. - Request for refund of a hearing fee for a new FM radio station at Whitewater, Wisconsin - **Granted** (June 29, 1993).

Van Dam, Leon B. - Request for refund of a hearing fee for a new FM station at Pickford, Michigan - **Granted** (July 7, 1993).

NOTE: ANY QUESTIONS REGARDING THIS REPORT SHOULD BE DIRECTED TO THE PREPARER, CLAUDETTE PRIDE, CHIEF, FEE SECTION ON (202) 632-0241.

FEDERAL COMMUNICATIONS COMMISSION

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

JUL 2 1993

OFFICE OF
MANAGING DIRECTOR

Henry A. Solomon, Esq.
Haley, Bader & Potts
4350 North Fairfax Drive
Suite 900
Arlington, Virginia 22203-1633

Dear Mr. Solomon:

This will respond to your request for refund of a hearing fee filed on behalf of Central Television, Inc., debtor-in-possession of WTZH(TV), Meridian, Mississippi.

You state that prior to designation for hearing, WMDN, Inc., which is Central's successor-in-interest and represents Central's same ownership interests, filed a settlement agreement with its competing applicant. If approved, the settlement agreement would result in the grant of the application of WMDN, Inc.

Section 1.1111(c)(1) of the Commission's rules provides for refund of a hearing fee whenever an application is granted without hearing. In the instant case, the refund request is premature. The settlement agreement is still under review, the application of WMDN, Inc. has not yet been approved, and there is a related waiver request of the Commission's duopoly rules still pending.

Accordingly, at this time, we are unable to consider your request for refund and it must therefore be denied without prejudice.

Sincerely,

Thomas M. Gallagher for

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUN 30 1993

Mr. Roderick M. Cox
P.O. Box 404
St. Peters, Missouri 63376

Dear Mr. Cox:

This is in response to your request for refund of the fee that you submitted with your application for a new FM station at New London, Missouri.

You state that your application was returned as unacceptable for filing. You contend, therefore, that your application fee should be refunded because no filing fee should be assessed for an application not accepted for filing.

Our review of the matter discloses that your application was returned because your proposed station was short spaced to station KDAM(FM), Monroe City, Missouri, and a waiver of this deficiency could not be granted because your technical showing failed to meet the standards contained in section 73.215 of the Commission's rules. 47 C.F.R. § 73.215. See letter from Dennis Williams, Chief FM Branch to Roderick M. Cox, dated March 31, 1993. Thus, your application was returned due to substantive defects.

The Commission has determined that application fees will be retained once an application completes the fee review process regardless of the underlying application's substantive disposition except in the instances enumerated in section 1.1111 of the Commission's rules. See Establishment of Fee Collection Program, 2 FCC Rcd 947, 949 (1987), reconsidered, 3 FCC Rcd 5987 (1988). None of the exceptions to the fee retention requirement, embodied in section 1.1111, is applicable to your refund request. Moreover, while as a procedural matter, your application was dismissed as unacceptable for filing, clearly its merits were the subject of a full and careful review before its return as defective. Therefore, we find no basis upon which to grant a refund of your application fee.

Accordingly, your request is denied.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

William D. Freedman, Esquire
Gurman, Kurtis, Blask & Freedman
1400 Sixteenth Street, N.W.
Suite 500
Washington, D.C. 20036

Re: Dade City Broadcasting, Inc.
For a new FM Station at
Dade City, Florida
File No. BPH-920522MD

Dear Mr. Freedman:

This is in response to your request for refund of the fee submitted in the above-referenced matter.

Your request is granted. We have reviewed the facts surrounding your filing and have concluded that a refund is warranted pursuant to Section 1.1111 of the Commission's rules. 47 C.F.R. § 1.1111 The subsection checked below is specifically applicable to your request.

____ No fee is required for the above-referenced submission (§1.1111(a)(1)).

____ An insufficient fee has been submitted with the application/filing (§1.1111(a)(2)).

____ The applicant cannot fulfil the prescribed age requirement (§1.1111(a)(3)).

____ The Commission has adopted a new rule that has nullified the application after its acceptance for filing (§1.1111(a)(4)).

____ A new law or treaty has rendered useless a grant or other positive disposition of the application (§1.1111(a)(4)).

____ The application was not timely filed in accordance with the filing window as established by the Commission (§1.1111(6)).

__X__ In the case of a broadcast applicant, the application was granted without being designated for hearing (§1.1111(b)(1)).

____ In the case of a broadcast applicant, the application was dismissed prior to designation for hearing or in the order designating the case for hearing (§1.111)(2)).

____ In the case of a broadcast applicant, the application was dismissed for failure to file a Notice of Appearance (§1.1111(b)(2)).

____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding to file a Notice of Appearance and the application was immediately grantable (§1.1111(b)(3)).

____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding who filed a Notice of Appearance and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(3)).

____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for the dismissal of all but the above-referenced application, and the application was immediately grantable (§1.1111(b)(4)).

____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for dismissal of all but the above-referenced application and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(4)).

A check, made payable to maker of the original check and drawn in the amount of $6,760.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Thomas M. Collins for

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUL 19 1993

Gregg P. Skall, Esq.
Pepper & Corazzini
1776 K Street, N.W.
Washington, D.C. 20006

Dear Mr. Skall:

This is in reference to the letter of July 7, 1993, in which the request for refund of a hearing fee filed on behalf of Mr. Charles Fitzgerald was granted. According to our records, the original check filed on behalf of Mr. Fitzgerald was drawn in the amount of $6,800.00. Therefore, a check, made payable to the maker of the original check and drawn in that amount, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

for Thomas W Hilliard

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUL 7 1993

Gregg P. Skall, Esq.
Pepper & Corazzini
1776 K Street, N.W.
Washington, D.C. 20006

Dear Mr. Skall:

This will respond to your request for refund of a hearing fee filed on behalf of Mr. Charles Fitzgerald in connection with his construction permit application for a new television station at Jacksonville, North Carolina.

You state, and your documentation demonstrates, that prior to the Notice of Appearance deadline, Mr. Fitzgerald entered into a settlement agreement with his competing applicants. The presiding judge approved the settlement agreement, dismissed Mr. Fitzgerald's application, and granted the single remaining application. Under the circumstances, since the settlement agreement was timely filed and the remaining application was immediately grantable, refund of the hearing fee is appropriate under 47 C.F.R. § 1.1111(b)(4).

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $6,760.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUL 9 1993

Lawrence J. Bernard, Jr., Esquire
2000 L Street, N.W.
Suite 504
Washington, D.C. 20036

Dear Mr. Bernard:

This will respond to your request for refund of a hearing fee filed on behalf of Jean M. Hovermale and Christine Harvin, d/b/a Summer Town Partners ("STP"), in connection with its construction permit application for a new FM station at Summerton, South Carolina.

You state, and your documentation shows, that prior to designation for hearing, STP entered into a settlement agreement with its competing applicant. The Mass Media Bureau approved the settlement agreement, granted STP's application, and dismissed the competing application. Under the circumstances, since STP's application was granted without being designated for hearing, refund of the hearing fee is appropriate under 47 C.F.R. § 1.1111(b)(1).

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $6,760.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUN 15 1993

CERTIFIED MAIL -- RETURN RECEIPT REQUESTED

William E. Zimsky, Esq.
Law Offices of William E. Zimsky
P.O. Box 3005
Durango, CO 81302

Dear Mr. Zimsky:

This responds to the petitions for reconsideration and reinstatement that you filed in connection with the applications of Kim LaVanway, Brian Rooney, Amy Trieble, Roberta Ronlund and Steven Heffelfinger for licenses in the Interactive Video Data Service (IVDS) for service areas 002, 003, 004, 006, 007, 008, 009 and 010.

In its Memorandum Opinion and Order in Gen. Docket No. 91-2, 8 FCC Rcd 2787 (1993), the Commission determined that the appropriate fee for IVDS applications is $35, not $1400 as originally provided. Consistent with the Commission's decision, we hereby reinstate nunc pro tunc all of the above-referenced applications, conditioned on the original (or a copy) of each application being resubmitted, with a check for the $35 fee, before June 28, 1993. The resubmitted applications, with a separate check for the $35 fee for each application, should be sent to the following address:

Federal Communications Commission
Interactive Video and Data Service
P.O. Box 358245
Pittsburgh, PA 15251-5245.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

DSolomon:OGC
cc: File, Reading File, Attorney File, David Solomon, Larry Schaffner, Sheldon Guttmann, Kathy Dole, Managing Director, Chief, Fee Section, Private Radio Bureau

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUL 2 1993

Mania K. Baghdadi, Esq.
Fletcher, Heald and Hildreth
1300 North 17th Street
Rosslyn, VA 22209

Dear Ms. Baghdadi:

This is in response to your request for a refund of an application fee submitted on behalf of Richard C. Marsh and Richard E. Marsh. Because your request was submitted on November 14, 1990, we apologize for the delay in our response.

You state that on November 14, 1990, Messrs. Marsh filed an application on FCC Form 315 to transfer ownership of Pacific Broadcasting Company (Pacific), licensee of KSPE(AM) and KDB(FM) to Robertson C. Scott, Harvey Pool and Pacific. A fee of $565.00 (the fee for one license) was tendered with the application. The application was returned for "an insufficient fee." On December 6, 1990, you resubmitted the original application with a fee for two stations ($1130.00).

You also state that on November 15, 1990, Pacific filed an application on FCC Form 314 to assign the license of AM Station KSPE from Pacific to Spectacular Broadcasting, Inc. (Spectacular), owned by Messrs. Marsh. A fee of $565.00 was submitted with the application.

Based on these facts, you submit that the transaction should be construed as an assignment of the license of Station KSPE from Pacific to Spectacular, thus leaving only the license of KDB(FM) with Pacific, and subsequently the transfer of ownership of Pacific to the new owners. You also state that the transactions were intended to be concurrent. Thus, you contend that the licenses of only two stations, rather than three, were affected and thus, a refund in the amount of $565 is warranted.

It is apparent that at the time you filed the original application, the proper fee that should have been submitted was $1130.00. In this regard, the following is pertinent:

> An additional fee will be required for each station license even though the applicant may wish to assign or transfer multiple licenses on one application. In this connection, the applicant should clearly identify, either by transmittal letter or other appropriate means, the station licenses covered by the application in order that the overall fee may be readily and accurately determined. . . . In those

instances where a single form allows for multiple chargeable actions, we proposed to charge for each action. We believe this is consistent with the congressional intent to institute a charge for each regulatory service, regardless of the filing procedure used. The Commission undertakes a separate and distinct review for each license listed on Forms 314, 315, 316, or 345. Therefore, we believe a separate fee is justified for each such license.

Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, 2 FCC Rcd 947, 967 at ¶ 150 (1987). Absent any explanation that Station KSPE was not to be covered by the transfer application, the Commission was obligated to return the application for a fee covering both stations. In fact, you subsequently retendered the original application with fees for both stations. The Commission was obligated to process this application as transferring the licenses of two stations to Pacific under the new ownership. The assignment of KSPE from Pacific to Spectacular was clearly a separate and distinct transaction.

At the time the applications were filed, the Commission could reasonably conclude that the service requested was a transfer of the ownership of two stations to new owners and the subsequent assignment by the new ownership of one station to another entity. You had the opportunity to clarify the actions you requested in the original application, the application for assignment of KSPE and the retendered application for transfer, but you did not. Your subsequent explanation on December 19, 1990, comes too late to alter the nature of the services requested and ultimately provided by the Commission.

Accordingly, your request for refund of one of the $565.00 filing fees is denied.

In a related matter, you stated that it was your assumption that the $565 fee submitted with the original FCC Form 315 would be refunded. According to our records, a $565 check payable to Pacific Broadcasting Company was sent February 6, 1991 to Pacific Broadcasting Company, 23 West Micheltorena, Santa Barbara, CA 93101. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUN 30 1993

Margot Polivy, Esquire
Renouf & Polivy
1532 Sixteenth Street, N.W.
Washington, D.C. 20036

Dear Ms. Polivy:

This is in response to your request for a ruling on whether an additional fee must be submitted by Charlotte McNaughton to cover her application to modify her existing construction permit for KCLM (FM), Newport, Oregon.

You state that Ms. McNaughton's initial application was returned because pages 25 and 26 of the application were omitted. You have now filed the complete application, and you contend that no further fee is due because the Commission's rules specifically provide that no fee will be assessed when an application, returned for corrections, is resubmitted. 47 C.F.R. § 1.1107(d).

Section 1.1107(d) of the Commission's rules provides that no fee payment is required when an applicant resubmits an application returned for corrections or additional information. Our review of this matter discloses no basis for return of the application except for Ms. McNaughton's initial failure to file a complete application. Therefore, we conclude that no further fee is due with her application.

Sincerely,

Thomas M. Halloran for

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

APR 30 1993

David S. Keir, Esq.
Leventhal, Senter & Lerman, P.C.
2000 K Street, N.W.
Suite 600
Washington, D.C. 20006-1809

Dear Mr. Keir:

This is in response to your requests for refund of hearing fees submitted on behalf of Orange County Broadcasting Corporation (OCBC), permittee of AM radio broadcast station KPLS(AM), Orange, California (File No. BP-900405CG), and BuenaVentura Communications, Inc. (BuenaVentura), licensee of AM radio broadcast station KCTQ(AM), Thousand Oaks, California (File No. BMP-910429AG).

You state that when OCBC filed a major change amendment application for KPLS(AM), the Commission released a public notice explaining that this application was mutually exclusive with a modification application to upgrade KCTQ(AM), and as a result, both applicants were required to pay hearing fees of $6,760.00 by March 31, 1992. See Public Notice, Report No. B-89, released January 30, 1992. Both OCBC and BuenaVentura paid their fees in a timely fashion, accompanied by a Joint Notice of Removal of Mutual Exclusivity and Request for Waiver of Hearing Fees (Joint Notice), which explained that a proposed amendment to BuenaVentura's application, if accepted, would remove the mutual exclusivity between the applicants so that no comparative hearing would be necessary. Therefore, the Joint Notice sought refund of both applicants' hearing fees.

By letter of April 27, 1993, the Chief, Audio Services Division granted BuenaVentura's amendment, removing the exclusivity between the applicants and thereby obviating the need for a comparative hearing. While you acknowledge that this situation is not specifically addressed by the fee rules, you argue that it is analogous to the provision allowing refund of an applicant's hearing fee upon a timely-filed agreement that results in universal settlement of a comparative proceeding. See 47 C.F.R. § 1.1111(b)(4). We agree. As you indicate, while there is no settlement that has been entered into here, no applicant will be dismissed, and no consideration has been paid or promised to BuenaVentura for amending its proposal; nevertheless, by virtue of BuenaVentura's amendment having been granted, the mutual exclusivity between BuenaVentura's application and that contained in OCBC's proposal has been eliminated so that there no longer is any need for a comparative hearing to resolve this conflict. Therefore, both applicant's hearing fees may be refunded.

Accordingly, your request for refund of the hearing fees for OCBC and BuenaVentura is granted. A check for $6,760, payable to the makers of the original checks, will be forwarded to you at the earliest practicable time. If you have any questions about these refunds, please call the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUN 30 1993

Stephen T. Yelverton, Esquire
1155 Fifteenth Street, N.W.
Suite 400
Washington, D.C. 20005

Re: Robert Carroll Rickenbacker
For a new FM Station
Bowman, South Carolina
File No. BPH-910227MI

Dear Mr. Yelverton:

This is in response to your request for refund of the fee submitted in the above-referenced matter.

Your request is granted. We have reviewed the facts surrounding your filing and have concluded that a refund is warranted pursuant to Section 1.1111 of the Commission's rules. 47 C.F.R. § 1.1111. The subsection checked below is specifically applicable to your request.

____ No fee is required for the above-referenced submission (§1.1111(a)(1)).

____ An insufficient fee has been submitted with the application/filing (§1.1111(a)(2)).

____ The applicant cannot fulfil the prescribed age requirement (§1.1111(a)(3)).

____ The Commission has adopted a new rule that has nullified the application after its acceptance for filing (§1.1111(a)(4)).

____ A new law or treaty has rendered useless a grant or other positive disposition of the application (§1.1111(a)(4)).

____ The application was not timely filed in accordance with the filing window as established by the Commission (§1.1111(6)).

____ In the case of a broadcast applicant, the application was granted without being designated for hearing (§1.1111(b)(1)).

_X_ In the case of a broadcast applicant, the application was dismissed prior to designation for hearing or in the order designating the case for hearing (§1.1111(b)(2)).

____ In the case of a broadcast applicant, the application was dismissed for failure to file a Notice of Appearance (§1.1111(b)(2)).

____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding to file a Notice of Appearance and the application was immediately grantable (§1.1111(b)(3)).

____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding who filed a Notice of Appearance and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(3)).

____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for the dismissal of all but the above-referenced application, and the application was immediately grantable (§1.1111(b)(4)).

____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for dismissal of all but the above-referenced application and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(4)).

A check, made payable to maker of the original check and drawn in the amount of $6,760.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Thomas M. Halloran for

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUL 19 1993

John S. Neely, Esq.
Miller & Miller, P.C.
1990 M Street, N.W.
Suite 760
Washington, D.C. 20036

Dear Mr. Neely:

This will respond to your request for refund of a filing fee filed on behalf of Patricia Rodgers, permittee of a new FM station at Campbellsville, Kentucky, in connection with her application for extension of time to construct. You state that the Bureau dismissed her application, noting that the construction permit would not expire until February 24, 1994. You explain that Ms. Rodgers filed the application mistakenly believing that her permit was about to expire on February 24, 1993. You contend that the fee should be refunded because the application was untimely.

The instances in which the Commission will refund a fee payment are enumerated in section 1.1111 of the Commission's rules. See 47 C.F.R. §1.1111. In adopting that rule, the Commission stated that "fees will be retained by the government irrespective of the disposition of the underlying application." Establishment of a Fee Collection Program, 2 FCC Rcd 947, 949 (1987). The Commission further stated that "it has always been the applicant's sole responsibility to know and comply with our rules in regard to application filing." Id.

Under the circumstances, it does not appear that a refund of the filing fee is warranted. It was incumbent upon Ms. Rodgers to be familiar with the conditions and terms of her construction permit. The fact that the application was untimely or mistakenly filed does not justify a refund under Section 1.1111.

Accordingly, your request is denied.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUL 2 1993

Mark N. Lipp, Esq.
Mullin, Rhyne, Emmons and Topel
1000 Connecticut Avenue, N.W.
Suite 500
Washington, D.C. 20036-5383

Dear Mr. Lipp:

This will respond to your request for refund of a hearing fee filed on behalf of Mr. David J. Shepherd in connection with his construction permit application for a new FM station at Dublin, Texas.

You state that, prior to designation for hearing, Mr. Shepherd and his competing applicant filed a settlement agreement that if granted would result in the grant of Mr. Shepherd's application.

Section 1.1111(c)(1) of the Commission's rules provides for refund of a hearing fee whenever an application is granted without hearing. In the instant case, the refund request is premature. The settlement agreement is still under review, Mr. Shepherd's application has not yet been granted, and futher, there is a pending petition that seeks rescission of the allocation.

Accordingly, at this time, we are unable to consider your request for refund, and it must therefore be denied without prejudice.

Sincerely,

Thomas M. Halloran for

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUN 29 1993

John S. Neely, Esq.
Miller & Miller, P.C.
P.O. Box 33003
Washington, D.C. 20033

Dear Mr. Neely:

This is in response to your request for a hearing fee refund filed on behalf of Scott M. Trentadue (Trentadue), the successful applicant for a new FM radio station at Whitewater, Wisconsin.

You explain that Section 1.1111(b)(3) of the rules provides for refund of hearing fees in those cases where only one applicant files a Notice of Appearance, pays its hearing fee and the application is immediately grantable. 47 C.F.R. § 1.1111(b)(3). You state that Trentadue was the only applicant in this proceeding to pay its fee and file a Notice of Appearance in a timely fashion, and that Trentadue therefore became the sole applicant whose application was immediately grantable. You also state, however, that grant of the Whitewater construction permit to Trentadue was delayed when the competing applicant appealed the dismissal of its application for late payment of the hearing fee, but that this matter has since been resolved. You now contend that Trentadue is due a refund of his hearing fee under Section 1.1111(b)(3), since Trentadue never was subject to a formal comparative hearing.

As explained more fully in the Managing Director's April 22, 1993 letter to you, the applicants in this proceeding participated in this comparative proceeding to a very limited extent and only as directed by the ALJ. Indeed, neither Trentadue nor FWK were formally subject to the comparative hearing process, for despite the numerous appeals filed with various bodies within the Commission, these pleadings revolved around one issue: dismissal of FWK's application for late payment of its hearing fee. We conclude, therefore, that Trentadue has satisfied the requirements of Section 1.1111(b)(3) for refund of his hearing fee.

Accordingly, a check in the amount of $6,760.00, payable to the maker of the original check, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please call Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

JUL 7 1993

OFFICE OF
MANAGING DIRECTOR

James R. Cooke, Esq.
Harris Beach & Wilcox
1611 N. Kent Street
Suite 1000
Arlington, Virginia 22209

Dear Mr. Cooke:

This will respond to your request for refund of a hearing fee filed on behalf of Mr. Leon B. Van Dam in connection with his construction permit application for a new FM station at Pickford, Michigan.

You state, and your documentation shows, that prior to designation for hearing, Mr. Van Dam entered into a settlement agreement with its competing applicant. The Bureau approved the settlement agreement, dismissed Mr. Van Dam's application, and granted the remaining application. Under the circumstances, since Mr. Van Dam voluntarily dismissed his application and the need for a hearing has been obviated, refund of the hearing fee is appropriate under 47 C.F.R. § 1.1111(b)(2).

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $6,760.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

*U.S. Government Printing Office: 1993 — 342-145/80024